Public Prosecutor v Kenneth Fook Mun Lee @ Omar Iskandar Lee bin Abdullah

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W–05–60 OF 2003 AND W–05–61 OF 2003
ABDUL KADIR SULAIMAN, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA
22 DECEMBER 2005

Criminal Law — Murder — Defence — Automatism — Hypoglycaemic attack — Whether proved

Criminal Law — Murder — Defence — Intoxication — Burden of proof — Whether burden to prove intoxication on accused — Penal Code ss 85 & 86 — Evidence Act 1950 s 107

Criminal Law — Murder — Defence — Intoxication — Whether self-induced intoxication excludes accused from liability of murder — Penal Code ss 85 & 86

Criminal Law — Murder — Intention — Whether 'intention' was a necessary element in s 300(d) — Whether prosecution only needs to prove 'knowledge' that the act was likely to cause death — Penal Code s 300(d)

Criminal Procedure — Defence not raised at defence's case but only raised during submission at conclusion of trial — Whether court should consider defence not raised — — Defence — Failure to mention material part of defence at earlier stage — Whether duty of court to anticipate and consider such defence at the conclusion of prosecution's case

The respondent was charged for having committed murder by causing the death of the deceased on 22 August 2000 at about 7.55pm at Jalan Istana Baru, district of Brickfields, Kuala Lumpur, an offence punishable under s 302 of the Penal Code ('the Code'). The respondent had during lunch that day drunk a few beers with his friends at a restaurant. The respondent said from the point of time he had lunch he could not remember what happened after that. He claimed he could not remember the time he left the restaurant, how he left the restaurant, whether he drove or somebody else drove him and whether it was during the day or night. The respondent also claimed he has low blood sugar and since 1991 had been taking glucose constantly with his drinks. Evidence was tendered to show that the respondent later parked his Volvo at the centre of Jalan Istana Baru obstructing cars passing through the road. The respondent then walked towards the deceased's Proton Perdana car and knocked on the window screen on the driver's side with his gun and asked the

deceased to come out. The deceased refused. He then attempted to open the door. The respondent subsequently moved towards the right side of the front windscreen of the Proton Perdana car and fired a shot at the deceased through the windscreen.

The respondent's counsel submitted that the facts did not indicate any intention on the part of the respondent to commit the offence of murder, therefore the charge should be reduced to one under s 304(b) of the Code. He also submitted that the prosecution failed to show direct intention in any one of the limbs of s 300 of the Code. The crux of the defence case was that at the time of commission of the offence the accused was undergoing an hypoglycaemic attack and was therefore in a state of automatism. Intoxication was only raised during submission by the respondent's counsel at the conclusion of the trial.

At the conclusion of the trial, the learned trial judge held that since the respondent failed to establish a hypoglycaemic episode at the material time, the 'alternative defence submission of intoxication becomes a live issue'. He then made a finding of fact that the respondent was in a state of intoxication at the time of the shooting incident which precluded him from forming the necessary intention. Thus, the learned trial judge decided that the facts of the case did not disclose an offence under s 300(d) of the Code and found the respondent guilty of an offence of culpable homicide not amounting to murder under s 304(b) of the Code. He sentenced the respondent to eight years imprisonment to take effect from the date of his arrest. The Public Prosecutor appealed.

The learned deputy public prosecutor submitted except for cases falling under ss 85(2) and 86(1) and (2) of the Code, intoxication is not a defence to any criminal charge and hence the presumption that an intoxicated person had the same knowledge as he would have had if he had not been intoxicated is still preserved by the provision. He also pointed out that s 85(2) of the Code was never raised by the defence and that s 86(2) does not apply in cases involving intention, specific or otherwise and hence, the issue of intention was not relevant in the present case.

Held, allowing the appeal:

(1) The exercise to consider a defence if the evidence discloses it even if it had not been raised, should only be undertaken at the conclusion of the trial when all the evidence is before the court. It is not the duty of the court at the end of the prosecution's case to anticipate or speculate any defence that has not been raised and give due consideration to it. More so, a defence categorically denied to be the line of defence to be taken as in this case (see para 96). Furthermore, such an exercise should only be considered if the evidence justifies it (see para 98).

(2) The learned trial judge had misdirected himself and erred in fact and in law in holding that the offence did not fall within murder at the conclusion of the trial. It is a question of law as to what is murder and it is but a question of law, not of fact, as to what the statutory words of the Code mean (see para 102); *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 followed.

(3) At the conclusion of the case for the prosecution, the learned trial judge had correctly found that the prosecution had made out a *prima facie* case of murder

under s 300(d) of the Code against the respondent and called upon him to enter his defence (see para 3). Besides being satisfied that the facts were capable of coming within the ambit of s 300(d) of the Code, the learned trial judge was also of the view at the conclusion of the case for the prosecution that the fact that the respondent was in a state of intoxication did not exclude him from liability under s 300(d) (see para 104). There was clearly a *prima facie* case against the respondent which, if unrebutted, would warrant his conviction and the learned trial judge was correct in calling upon the respondent to enter his defence. The learned trial judge correctly observed that 'intention' is not a necessary element in s 300(d) of the Code and all that is required to be proved is 'knowledge' that the act is likely to cause death (see para 105).

(4) This court agreed with the learned trial judge that the defence had failed to prove that the respondent was not conscious of what he was doing as a result of an unexpected hypoglycaemic attack (see para 111).

(5) There was no evidence to show that the respondent was intoxicated at the time of the incident (see para 115).

(6) The fact, as found by the learned trial judge, that the respondent was intoxicated at the time he shot the deceased was no excuse. Section 85(1) of the Code clearly provides that save as is provided in the section and in s 86, intoxication shall not constitute a defence to any criminal charge. Moreover, the intoxication, if at all, was admittedly self-induced and therefore, he must be deemed to have committed the act with the same knowledge as he would have had if he had not been intoxicated. The charge he was facing was murder under s 300(d) of the Code. The *mens rea* for that offence is 'knowledge' and not 'intention' (see para 120).

(7) Sections 85 and 86 are found in Chapter 4 of the Penal Code which deals with general exceptions, for which the burden of proof falls on the accused persons by virtue of s 107 of the Evidence Act 1950. Furthermore, s 85(1) expressly refers to s 86 as dealing with the 'defence' of intoxication. Therefore, any evidence of intoxication does not affect the prosecution's case; in proving beyond reasonable doubt that the accused had the necessary *mens rea* the prosecution is entitled to treat the accused as if he were sober. Furthermore, the scope of s 86(2) generously extends to voluntary intoxication, a legal excuse which can never put an accused in a more favourable position than another accused who pleads any of the other defences (see para 120).

(8) The weight of evidence clearly established that the respondent was very much in control of his actions despite the alcohol he consumed. Thus, he had failed to prove any incapacity as would be available to him as a defence. There was nothing to show that his mind was so affected by the alcohol he had consumed that he was incapable of knowing that what he was doing was wrong. When a man is charged with murder, it is a defence for him to say that he does not remember a thing (see para 121).

(9) The learned trial judge had misdirected himself in fact and in law and ought to have found the respondent guilty on the original charge of murder. The facts were sufficient to bring the case within the ambit of s 300(d) of the Code and the act of the respondent would fall within the definition of murder.

The invocation of s 300(c) of the Code by the learned trial judge was altogether erroneous. Intention is not a necessary element of an offence under s 300(d). All that is needed is knowledge that the act is likely to cause death. The emphasis in s 300(d) is on the imminently dangerous character of the act itself. Further, s 300(d) is usually applied where the act of the offender is in general disregard for human life and safety. What was clear from the evidence was the respondent did not know the deceased. He discharged the gun in absolute callousness towards the result. The act of the respondent could not fall within the purview of s 304(b) of the Code. He had committed culpable homicide amounting to murder and the offence committed by him clearly falls under s 300(d) of the Code. All the evidence proved beyond doubt that he had performed the act knowingly and voluntarily and hence must be guilty of an offence under s 302 of the Code. The respondent had failed to show on a balance of probabilities that he did not know that his act of discharging his gun at the deceased at such close quarters was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The learned trial judge's ruling at the conclusion of the trial that the facts could not fall within s 300(d) of the Code could not be supported having regard to the evidence. On the evidence it was clearly open to the learned trial judge to find that it was established beyond reasonable doubt that the respondent caused the death of the deceased (see para 128).

[Bahasa Malaysia summary

Responden telah dituduh melakukan pembunuhan dengan menyebabkan kematian si mati pada 22 Ogos 2000 pada lebih kurang pukul 7.55 malam di Jalan Istana Baru, daerah Brickfields, Kuala Lumpur, satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun tersebut'). Responden telah minum beberapa gelas bir waktu makan tengahari bersama beberapa orang rakan di sebuah restoran. Responden berkata sejak itu beliau tidak dapat ingat apa yang berlaku selepas itu. Beliau mendakwa bahawa beliau tidak mengingati apa-apa semasa meninggalkan restoran itu, bagaimana beliau meninggalkan restoran itu, sama ada beliau memandu atau seseorang telah memandu untuknya dan sama ada ia waktu siang atau malam. Responden juga mendakwa beliau mengalami tekanan darah rendah dan sejak 1991 sentiasa mengambil glukos bersama minumannya. Keterangan telah ditenderkan untuk menunjukkan bahawa responden kemudiannya telah meletakkan Volvonya di tengah-tengah Jalan Istana Baru yang menghalang kereta-kereta melalui jalan tersebut. Responden kemudian berjalan ke arah kereta Proton Perdana si mati dan mengetuk skrin tingkap di bahagian pemandu dengan pistolnya dan meminta si mati keluar. Si mati enggan. Beliau kemudian cuba untuk membuka pintu. Responden kemudian menuju ke sebelah kanan cermin depan kereta Proton Perdana dan menembak ke arah si mati melalui cermin depan itu.

Peguam responden berhujah bahawa fakta-fakta tidak menunjukkan apa-apa niat di pihak responden untuk melakukan kesalahan membunuh itu, oleh itu pertuduhan patut dikurangkan kepada suatu di bawah s 304(b) Kanun tersebut. Beliau juga berhujah bahawa pihak pendakwa raya gagal menunjukkan niat secara langsung dalam mana-mana cabang s 300 Kanun tersebut. Inti pati kes pembelaan adalah bahawa pada masa kesalahan dilakukan tertuduh mengalami serangan hipoglisemia

dan oleh itu berada dalam keadaan automatisme. Keadaan mabuk hanya timbul semasa penghujahan oleh peguam responden di akhir perbicaraan. A

Di akhir perbicaraan, hakim perbicaraan yang bijaksana memutuskan bahawa memandangkan responden telah gagal untuk membuktikan episod hipoglisemia pada masa matan maka 'alternative defence submission of intoxication becomes a live issue'. Beliau kemudian membuat satu penemuan bahawa responden berada dalam B keadaan mabuk pada masa kejadian tembakan itu menghalang beliau daripada mempunyai apa-apa niat tertentu. Oleh itu, hakim perbicaraan yang bijaksana telah memutuskan bahawa fakta-kes tidak membuktikan satu kesalahan di bawah s 300 (d) Kanun tersebut dan mendapati responden bersalah untuk kesalahan homisid salah yang tidak berjumlah kepada pembunuhan di bawah s 304(b) Kanun tersebut. Beliau telah menjatuhkan hukuman penjara selam lapan tahun ke atas responden C bermula kuat kuasa daripada tarikh tangkapannya. Pendakwa Raya telah merayu.

Timbalan pendakwa raya yang bijaksana telah berhujah dengan pengecualian kes-kes yang jatuh di bawah ss 85(2) dan 86(1) dan (2) Kanun tersebut, keadaan mabuk bukan satu pembelaan untuk apa-apa pertuduhan jenayah dan oleh itu anggapan bahawa seorang yang berkeadaan mabuk mempunyai pengetahuan yang sama seperti D jika beliau tidak berkeadaan mabuk masih dilindungi oleh peruntukan itu. Beliau juga menegaskan bahawa s 85(2) Kanun tersebut tidak pernah ditimbulkan oleh pihak pembelaan dan bahawa s 86(2) tidak terpakai dalam kes-kes yang melibatkan niat, yang khusus atau sebaliknya dan justeru itu, isu niat tidak relevan dalam kes semasa. E

Diputuskan, membenarkan rayuan tersebut:

(1) Ujian untuk mempertimbangkan suatu keterangan jika keterangan itu menunjukkan bahawa jikapun ia tidak ditimbulkan, ia hanya perlu F dilaksanakan di akhir perbicaraan apabila kesemua keterangan berada di hadapan mahkamah. Ia bukan kewajipan mahkamah di akhir kes pihak pendakwa untuk menjangka atau membuat spekulasi apa-apa pembelaan yang tidak ditimbulkan dan memberikan pertimbangan sewajar terhadapnya. Bahkan, suatu pembelaan secara kategori dinafikan sebagai suatu pembelaan G yang perlu diambilkira seperti dalam kes ini (lihat perenggan 96). Tambahan pula, ujian sebegini hanya patut dipertimbangkan jika keterangan tersebut menjustifikasikannya (lihat perenggan 98).

(2) Hakim perbicaraan yang bijaksana telah salah arah dan terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa kesalahan itu tidak terjatuh H dalam kategori membunuh di akhir perbicaraan. Ia merupakan satu persoalan undang-undang berhubung apa itu pembunuhan dan ia adalah suatu persoalan undang-undang, dan bukan fakta, berhubung apa maksud perkataan-perkataan statutori Kanun tersebut (lihat perenggan 102); *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 diikut.

(3) Di akhir kes pihak pendakwa, hakim perbicaraan yang bijaksana dengan betul I mendapati bahawa pihak pendakwa telah menunjukkan satu kes *prima facie* pembunuhan di bawah s 300(d) Kanun tersebut terhadap responden dan memanggil beliau untuk memasukkan pembelaannya (lihat perenggan 3). Selain daripada berpuas hati bahawa fakta-fakta tersebut boleh terangkum

dalam skop s 300(d) Kanun tersebut, hakim perbicaraan yang bijaksana juga berpendapat di akhir kes pihak pendakwa bahawa fakta yang responden berada dalam keadaan mabuk tidak mengecualikannya daripada liabiliti di bawah s 300(d) (lihat perenggan 104). Jelas terdapat satu kes *prima facie* terhadap responden yang mana, jika tidak dicabar, akan mewajarkan sabitannya dan hakim perbicaraan yang bijaksana dengan betul telah memanggil responden untuk memasukkan pembelaannya. Hakim perbicaraan yang bijaksana dengan betul telah meneliti bahawa 'niat' bukan satu elemen yang perlu dalam s 300(d) Kanun tersebut dan apa yang dikehendaki hanyalah untuk membuktikan 'pengetahuan' bahawa tindakan tersebut mungkin menyebabkan kematian (lihat perenggan 105).

(4) Mahkamah ini bersetuju dengan hakim perbicaraan yang bijaksana bahawa pihak pembela gagal untuk membuktikan bahawa responden tidak sedar apa yang beliau lakukan akibat serangan hipoglisemia (lihat perenggan 111).

(5) Tiada keterangan menunjukkan bahawa responden berkeadaan mabuk pada masa kejadian (lihat perenggan 115).

(6) Fakta, seperti yang didapati oleh hakim perbicaraan yang bijaksana, bahawa responden berkeadaan mabuk pada masa beliau menembak si mati buka suatu alasan. Seksyen 85(1) Kanun tersebut dengan jelas memperuntukkan bahawa kecuali diperuntukkan dalam seksyen tersebut dan dalam s 86, keadaan mabuk tidak membentuk suatu pembelaan untuk apa-apa pertuduhan jenayah. Bahkan, keadaan mabuk, jika apapun, diakui dilakukan dengan sendiri dan oleh itu, beliau dianggap telah melakukan tindakan tersebut dengan pengetahuan yang sama seperti jika beliau tidak berkeadaan mabuk. Pertuduhan yang dihadapkan olehnya adalah untuk pembunuhan di bahawa s 300(d) Kanun tersebut. *Mens rea* untuk kesalahan tersebut adalah 'pengetahuan' dan bukan 'niat' (lihat perenggan 120).

(7) Seksyen-seksyen 85 dan 86 terdapat dalam Bab 4 Kanun Keseksaan yang membincangkan pengecualian am, yang mana beban bukti terletak ke atas tertuduh menurut s 107 Akta Keterangan 1950. Tambahan pula, s 85(1) dengan jelas merujuk kepada s 86 apabila membincangkan 'pembelaan' untuk kemabukan. Oleh itu, apa-apa keterangan kemabukan tidak menjejaskan kes pihak pendakwa; dalam membuktikan melampaui keraguan munasabah bahawa tertuduh mempunyai *mens rea* yang perlu pihak pendakwa berhak melayan tertuduh seperti mana beliau berkeadaan tidak mabuk. Tambahan pula, skop s 86(2) secara meluas membincangkan kemabukan secara sukarela, satu alasan sah yang tidak boleh meletakkan tertuduh dalam kedudukan yang lebih baik daripada tertuduh lain yang merayu terhadap mana-mana pembelaan lain (lihat perenggan 120).

(8) Beban keterangan jelas membuktikan bahawa responden dapat mengawal tindakannya meskipun setelah meminum alkohol tersebut. Oleh itu, beliau telah gagal untuk membuktikan apa-apa ketidakupayaan yang dapat beliau gunakan sebagai suatu pembelaan. Tiada apa-apa untuk menunjukkan bahawa mindanya terjejas oleh alkohol yang telah diminumnya sehingga beliau tidak

mengetahui apa yang dilakukannya adalah salah. Apabila seseorang dituduh membunuh, ia suatu pembelaan untuknya mengatakan bahawa beliau tidak ingat apa-apa (lihat perenggan 121).

(9) Hakim perbicaraan yang bijaksana telah salah arah daripada segi fakta dan undang-undang dan sepatutnya mendapati responden bersalah berdasarkan pertuduhan asal untuk pembunuhan. Fakta-fakta mencukupi untuk menjadikan kes dalam skop s 300(d) Kanun tersebut dan tindakan responden terjatuh di bawah definisi pembunuhan. Penggunaan s 300(d) Kanun tersebut oleh hakim perbicaraan yang bijaksana sama sekali salah. Niat tidak semestinya merupakan suatu elemen untuk kesalahan di bawah s 300(c) Kanun tersebut. Apa yang perlu adalah pengetahuan bahawa tindakan itu mungkin boleh menyebabkan kematian. Penekanan dalam s 300(d) adalah pada sifat berbahaya tindakan itu sendiri. Bahkan, s 300(d) selalunya digunakan di mana tindakan pesalah itu tidak mengendahkan nyawa dan keselamatan manusia. Apa yang jelas daripada keterangan adalah bahawa responden tidak mengetahui si mati. Beliau melepaskan tembakan pistol tanpa sebarang perasaan terhadap akibatnya. Tindakan responden tidak mungkin terangkum dalam skop s 304(b) Kanun tersebut. Beliau telah melakukan homisid salah yang tidak berjumlah kepada pembunuhan dan kesalahan yang dilakukan olehnya jelas jatuh di bawah s 300(d) Kanun tersebut. Kesemua keterangan dibuktikan melampaui keraguan bahawa beliau melakukan tindakan tersebut dengan pengetahuan dan secara sukarela dan justeru itu adalah bersalah kerana kesalahan di bawah s 302 Kanun tersebut. Responden telah gagal untuk menunjukkan atas imbangan kebarangkalian bahawa beliau tidak mengetahui bahawa tindakannya melepaskan tembakan pistol ke arah si mati pada jarak dekat adalah amat berbahaya sehingga ia semestinya dalam segala kemungkinan mengakibatkan kematian atau kecederaan pada badan yang mungkin mengakibatkan kematian. Keputusan hakim perbicaraan yang bijaksana di akhir perbicaraan bahawa fakta-fakta tersebut tidak boleh terangkum di bawah s 300(d) Kanun tersebut tidak dapat disokong dengan mengambilkira keterangan. Berdasarkan keterangan adalah jelas ianya terbuka kepada hakim perbicaraan yang bijaksana untuk memutuskan bahawa ia telah membuktikan melampaui keraguan munasabah bahawa responden telah mengakibatkan kematian si mati (lihat perenggan 128).]

Notes

For a case on defence for murder, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1386–1401.

For cases on Penal Code s 300, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 1080.

Cases referred to

Abdullah bin Jacomah v PP [2002] 6 MLJ 324 (refd)
Behari v State AIR 1953 All 203 (refd)
Chan Chor Shuh v Pendakwa Raya [2003] 1 AMR 748 (refd)
Juma'at bin Samad v PP [1993] 3 SLR 338 (refd)
Kanji v State (1953) Cri LJ 434 (refd)
Manindra Lal Das v Emperor AIR 1937 Calcutta 432 (refd)

A *PP v Ramasamy a/l Sebastian* [1991] 1 MLJ 75 (refd)
Pitchi Muthu, Re [1970] 2 MLJ 143 (refd)
Santosh v The State of Madhya Pradesh (1975) Cri LJ 602 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (folld)

B **Legislation referred to**
Criminal Procedure Code ss 180, 181, 182A
Penal Code ss 84, 85(1), (2)(b), 86(1), (2), 300(a), (b), (c), (d), 302, 304(b), 304A
Penal Code [India] ss 300(d), 302

C **Appeal from**: Criminal Trial No 45–52 of 2000 (High Court, Kuala Lumpur)

Abdul Karim Jalil (Ahmad Fairoz Zainal Abidin and Ian Shung Kuan) (Deputy Public Prosecutors, Attorney-General's Chambers) for the appellants.
M Kumarendran (Rabinder Singh and Mohd Hisham Mohd Nazir) (Rabinder Budiman & Associates) for the respondent.
D

Mohd Ghazali Yusoff JCA (delivering judgment of the court):

E **[1]** The respondent was charged for having committed murder by causing the death of Lee Good Yew ('the deceased') on 22 August 2000 at about 7.55pm at Jalan Istana Baru, district of Brickfields, Kuala Lumpur, an offence punishable under s 302 of the Penal Code ('the Code').

F **[2]** In his opening speech at the commencement of the trial, the learned Deputy Public Prosecutor said that the prosecution will prove beyond reasonable doubt that the respondent committed murder under s 300 of the Code and punishable under s 302 of the same.

G **[3]** At the conclusion of the case for the prosecution, the learned trial judge found that the prosecution had made out a *prima facie* case of murder under s 300(d) of the Code against the respondent and called upon him to enter on his defence. Section 300 of the Code reads:

> Except in the cases hereinafter excepted, *culpable homicide is murder*:
>
> H (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> I (d) *if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.*
>
> (Emphasis added.)

[4] At the conclusion of the trial, the learned trial judge decided that the facts of the case did not disclose an offence under s 300(d) of the Code and found the respondent guilty of an offence of culpable homicide not amounting to murder under s 304(b) of the Code. He sentenced the respondent to eight years imprisonment to take effect from the date of his arrest, viz 22 August 2000.

[5] The Public Prosecutor appealed. The respondent cross-appealed against his conviction and sentence.

[6] The evidence adduced by the prosecution showed that at about 12.45pm on 22 August 2000, the respondent went to the Weng Seng Restaurant ('the said restaurant') situated at No 93, Jalan 8, Batu 9, Cheras and joined three friends for lunch. He came alone in his Volvo car. The respondent and two of his friends also consumed beer and drank a total of 10 large bottles of Tiger beer. The respondent drank about five to six glasses of beer. They ordered the last beer at about 6.00pm and were at the said restaurant till about 7pm. The respondent then left the said restaurant in his Volvo car.

[7] The following is an account of what the following witnesses saw on 22 August 2000 at about 7.55pm at Jalan Istana Baru, viz., the scene of the incident:

(a) PW4, a part-time taxi driver, was driving his taxi along Jalan Istana Baru when he saw the said Volvo car parked across the road. He saw the respondent, who was standing in the middle of the road, stopping a motorcyclist. When the motorcyclist sped off, the respondent bent down, took out a gun from an ankle holster and fired two shots in the air. The respondent then stopped PW4 by pointing the gun at him. PW4 immediately stopped his taxi. The window screen at the driver's side was wound down at that time. The respondent in a loud and fierce voice ordered him out of the taxi. PW4 did as he was told. The respondent then pointed the gun in the direction of his head and stomach and told him to stand up straight. When he did as ordered, the respondent signalled to him the 'good' sign by showing a thumb. PW4 stood there for about 10 minutes. The respondent then looked towards his right and saw a Proton Perdana car, which was driven by the deceased, moving slowly. The respondent walked towards the said Proton Perdana car which was about 10 feet away from his taxi and knocked on the window screen at the driver's side of the car. PW4 took this opportunity and drove off.

(b) PW3, who was driving home from work heard the sound of a gunshot at the junction of Jalan Dewan Bahasa and Jalan Istana Baru. She saw the said Volvo car parked across the road in the centre of Jalan Istana Baru obstructing cars from passing through the road. She also saw PW4's taxi to the left of the said Volvo car and noticed that the driver of the taxi had alighted. The respondent was standing beside the taxi and holding a gun. The said Proton Perdana car was on her left. The respondent then walked towards the said Proton Perdana car and knocked on the window screen on the driver's side with his gun and asked the deceased to come out. The deceased refused. He then attempted to open the door. The respondent subsequently moved towards the right side of the front windscreen of the said Proton Perdana car and fired a shot at the

deceased through the windscreen. She saw the said Proton Perdana car moving forward slowly and hitting the said Volvo car. PW3 then drove off.

(c) PW6, a photographer with a local publication company was riding his motorcycle at about 7.55pm along Jalan Istana Baru when he saw the said Volvo car parked across the road. He saw the respondent holding up a few cars as if in a roadblock. The respondent then walked towards the direction of the said Proton Perdana car, spoke to the deceased whilst pointing a gun and subsequently fired a shot towards the front windscreen whilst standing next to the front right tyre of the car. He saw the said Proton Perdana car moving forward slowly and hitting the said Volvo car. PW6 shouted at the respondent who then fired a shot at him. It missed him. PW6 then shouted at the drivers of other cars which had stopped at the scene to get out of their cars and run away. He also ran away. He heard another shot being fired whilst running. He then saw the respondent firing two to three shots at a military land rover which had stopped in front of the MAA building located within the vicinity. The respondent consequently walked towards the military land rover and later towards a car-park in front of the MAA building. A moment later the respondent walked back to the main road and approached a stationary taxi and leaned against it.

[8] A few minutes later PW7, a police inspector and PW11, a police lance corporal arrived at the scene. They saw the respondent waiving his gun at some bystanders who had gathered at the scene. The respondent attempted to fire at them but had by then run out of bullets. He was then placed under arrest and brought to the Police Contingent Headquarters ('IPK'), Kuala Lumpur. They arrived at the IPK at 8.20pm. PW7 found a gun holster on the left leg of the appellant and discovered that the gun's magazine was empty.

[9] Meanwhile, PW17, a police lance corporal and another police-man who by then were at the scene found that the front windscreen of the said Proton Perdana car had a suspected bullet hole. They found the deceased unconscious and from the blood marks on her chest suspected that she had been shot. The deceased was then sent to the hospital.

[10] Wan Kok Chai (PW15), an Assistant Superintendent of Police who led the investigation in this case went to the IPK at 10.05pm on 22 August 2000. He then left for the scene of the incident and arrived there at about 10.20pm. He found two cars parked on the right hand side of the road; the said Proton Perdana car was parked facing Istana Negara and the said Volvo car was facing the opposite direction, ie against the flow of traffic. He found the bullet hole on the front windscreen on the driver's side of the said Proton Perdana car. About 470 metres away at Dewan Bahasa, he found the military land rover parked by the side of the road and upon examining the land rover found a bullet hole. He returned to the IPK at about 11.15pm.

[11] According to PW14, the owner of the said restaurant, the respondent appeared normal and did not look drunk when he left the restaurant. PW4, the taxi driver who was confronted by the respondent at the scene of the incident, testified that the respondent looked normal and was 'steady' and not staggering when walking.

He did not detect any smell from the respondent. PW7, the police officer who arrested the respondent and brought him to the IPK also observed that the respondent was 'steady before his arrest'. Whilst waiting for PW15, he noticed that the respondent had relieved himself whilst fully-clothed and was lying down. The respondent then slept for about 20 minutes and was snoring.

[12] When PW15 went to the IPK to commence his investigation on the case, he saw the respondent sleeping on the floor. When he returned from the scene of the incident, he found the respondent seated on the floor and handcuffed. The respondent got up when he saw him. He appeared very angry and was scolding everybody who was near him. He stated that the appellant appeared aggressive and had a strong smell of alcohol. The respondent also made a request that he be allowed to make a telephone call to Tan Sri Musa Hitam but PW15 did not accede to that request.

[13] In relation to the position of the said Volvo car at the scene of the incident, PW15 said he could not find any witness to explain how the car came to be in the position it was found. He found no tyre-marks on the road and in relation to this said 'there was no evidence of a violent driving.' In describing the route to be taken from the said restaurant to Jalan Istana Baru, PW15 said:

> I am familiar with the road one has to take from the restaurant in Cheras to Jalan Istana. From the restaurant one has to come out to the main road of Jalan Cheras and turn into Connaught Highway. There is a toll at Connaught Highway where payment has to be made on the spot. After the toll one has to proceed straight and make a turn down to the main road of Jalan Sungei Besi passing by the old airport on the left. Then one has to turn left where we can join up with Jalan Dewan Bahasa and from there join up with Jalan Istana Baru. It would involve one going into the road in P 3B. From there one would join the main road at Jalan Istana.
>
> There is only one toll as I had mentioned. I agree that before the Connaught toll there is the Cheras toll. That is also a pay and go toll. There was no report of any mischief on both the tolls. There was also no report of dangerous driving by a car fitting the description of the Volvo from 7.00 to 8.00 p.m. on the 22nd.

[14] At about 12.30am on 23 August 2000, PW15 brought the respondent to the hospital. The respondent was referred to PW8, Dr Bhawani Veloo at about 1.15am and she was asked to examine the respondent. PW15 gave her a consent form, which was signed by the respondent and him. In her evidence, PW8 said the respondent was very restless and was demanding to contact his wife. He sat on the patient's chair and was 'restless, agitated and verbally abusive'. She stated that the respondent was under the influence of alcohol but was lucid which she explained to mean that he was still alert at the time he was brought to the hospital. She noticed that the respondent had some superficial abrasions and found he was conscious with stable vital signs. In relation to this, she said:

> That means that his blood pressure and pulse rate were within normal range. His blood pressure was 130 by 80 mm of mercury. His pulse rate was 102 per minute. His temperature was 37C. This is normal. He was not pale or jaundiced. There was a strong alcohol odour on his breath. His pupils were equal and reactive to light. That means normal. His face was

flushed and his hands were unsteady. His heartbeat was normal. His lungs were clear. His abdominal examination was normal. His central nervous system examination revealed no focal deposit.

I could see the injuries that he had sustained.

I elicited some history from the accused. He conversed with me. He was very agitated, demanding to be freed of his handcuffs and demanding to see his wife. His speech at that time was slurred. When I interviewed him he responded to the questions I asked. He stated his full name. I asked him what was the reason he was brought by the police. He said that he had consumed alcohol in the evening of 22 August 2000 and he was not aware of the reason why the police had arrested him. I then asked him his past medical history. He said that he had no medical illnesses previously. I then asked him whether he had any psychiatric or mental illnesses previously which he also denied. I then asked him whether he was on any medication. He said that he was not on any medication.

[15] In relation to the consent form to take blood and urine samples to be tested for alcohol, PW8 stated she explained the procedure to the respondent and he said he understood. The respondent then signed the form in her presence. She also stated that the respondent co-operated but he insisted on somebody informing his wife. The respondent then took a piece of paper from her and wrote a note to one Professor Dr Ernest Yeoh and gave it to her. That note, which was tendered and marked as exh P17 reads:

TO: PROF DR

ERNEST YEOH

MY NAME IS KENNY LEE. I HAVE BEEN ARRESTED BY THE POLICE SINCE 5.00 SOMETHING THIS EVENING.

PLEASE INFORM MY WIFE 7555671 & HAVE HER CALL MUSA HITAM.

SGD

(KENNETH).

[16] PW8 also said the following:

In the course of my duty I have examined patients under the influence of alcohol countless times. I have not given evidence in court on this aspect. I can testify on the effect of alcohol. I say that the accused was under the influence of alcohol because, firstly, admission by the accused himself that he had consumed alcohol before the incident incurred (sic), secondly, when the accused was brought in several factors clinically indicated that he was alcohol intoxicated. Firstly, the alcohol smell in his breath. Secondly, his flushed face. Thirdly, his staggering gait. Fourthly, the unsteadiness of his hand. Fifthly, his slurred speech. Sixthly, extreme state of agitation. All these factors point towards alcohol intoxication. He was lucid. I say this because the accused was able to state his full name clearly and was able to write P 17 without difficulty and Prof Dr Ernest Yeoh had just joined the Emergency Department prior to the incident. This means that the accused is able to recall and is orientated to time, place and person when I saw him at 1.15am.

[17] Under cross-examination, PW8 was questioned extensively by the defence on the symptoms of hypoglycaemia. She said she did not conduct any clinical test to

determine the intoxication of the respondent. She explained that she found the respondent to be alcohol intoxicated based on her clinical findings and agreed that 'it is possible for him to be hypoglycaemia'. As to the state of mind of the respondent at 8pm, she said:

> I cannot attest to the accused's state of mind at the time of the incident. I can only say that I saw him five hours after the incident. It is possible that he was coming out of his condition at 8pm. I can only testify positively on this if I knew his condition at 8pm. I cannot attest as to the behaviour of the accused at 8pm. I was not there. If his condition at 8pm was alcohol then after five hours it would have worn off a little. If it was alcohol his condition at 8pm would have been more severe. The level of intoxication at 8pm would be more. The outward symptoms of intoxication would be more.

[18] Under re-examination, in relation to the respondent's pulse rate of 102, PW8 said a pulse rate of 102 means that it is slightly higher and that there are hundreds of causes for this rate; anger can be a cause but this pulse rate is not conclusive of hypoglycaemia. She also said:

> In my opinion the accused did not present himself as a hypoglycaemia patient. I say this because at that time the accused was alert, was not sweating, was able to answer my questions. It is possible that prior to my seeing him he had recovered from hypoglycaemia. There will be no symptoms to indicate that a person has recovered from hypoglycaemia.

[19] At about 1.30pm on 23 August 2000, PW16, a forensic pathologist attached to the University Hospital, Kuala Lumpur carried out an autopsy on the deceased. He testified that all the injuries were necessarily fatal in nature and that the injury to the heart, lung and aorta gave no chance of survival. They were all caused by a single bullet traversing through these areas. He was of the opinion that the cause of death was due to a bullet wound to the chest with injuries to vital organs and the injuries sustained by the deceased were necessarily fatal and 'nothing could have saved her.' He also said that a ripped-off jacket of a rifled weapon bullet was found lodged in the fractured 11th thoracic vertebra and a severely deformed lead core of the bullet was found lodged in the left lumbar area of the back closer to the first lumbar vertebra underneath the skin of the deceased.

[20] In the course of investigations, the said Proton Perdana car, the gun and the respondent's blood and urine samples were sent to the Chemistry Department for analysis. PW13, the chemist who conducted the analysis on the said exhibits testified there was a hole on the offside region of the windscreen of the said Proton Perdana car and it was consistent with being a bullet hole. His examination of the military land rover also revealed a penetrating hole on the nearside rear door frame consistent with being a bullet hole. In relation to the gun, he said it had gunpowder residue in its barrel indicating that it had been fired since it was last cleaned. He also found that the slugs and casings sent for analysis were fired from the gun seized from the respondent. PW13 also analysed the blood sample obtained from the respondent and found it to contain 198 milligrams of ethyl alcohol per 100 millilitres. The urine sample obtained from the respondent contained 257 milligrammes of ethyl alcohol per 100 millilitres. In relation to this PW13 said:

A

> With regard to the blood and urine specimens that I received the quality was good for me to carry out analysis of the alcohol content in them. The results of the alcohol in the urine as compared to that in the blood specimen was approximately in the ratio of 4 to 3. This is consistent with the ratio normally reported to show the distribution of the alcohol in the urine and the blood. This level of alcohol in the urine and blood will have some effects on the person.

B

[21] At the conclusion of the case for the prosecution, the respondent's counsel submitted that the facts did not indicate any intention on the part of the respondent to commit the offence of murder. He also argued that clause (d) of s 300 of the Code was inapplicable as it applies only in cases envisaged by illustration (d) of the section.

C

Illustration (d) reads:

> A, without any excuses, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

D

[22] The respondent's counsel further argued the prosecution has failed to prove a *prima facie* case of murder. He submitted there is only a *prima facie* case, if at all, under s 304(b) of the Code although 'the shadow' of s 304A of the Code 'lurks in the background'. He further submitted that clause (d) of s 300 of the Code is not relevant and it only applies in a situation 'where the victim is not an identifiable

E

person'. After summarizing the facts adduced by the prosecution, the respondent's counsel submitted that the charge should be reduced to one under s 304(b) of the Code. He also submitted that the prosecution failed to show direct intention in any one of the limbs of s 300 of the Code. Section 304 of the Code provides:

F

> Whoever commits culpable homicide not amounting to murder shall be punished:
>
> (a) …; or
>
> (b) with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death but without any intention to cause death, or to cause such bodily injury as is likely to case death.

G

[23] Section 304A of the Code provides:

> Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

H

[24] The learned trial judge's transcript of the trial showed, at the conclusion of the case for the prosecution, learned counsel for the respondent had also addressed the court as follows:

I

> As a measure of indication of our defence we would like to make it clear that the accused's defence will only be one of hypoglycaemia. That will be the sole defence. We mention this so that we are not accused later on of being not bona fide. We are delaying the issue of the consent till accused has given evidence.

[25] The learned Deputy Public Prosecutor submitted that the prosecution has made out a *prima facie* case against the respondent. He pointed out that for a charge of murder under s 302 of the Code, the prosecution has to prove:

(i) that Lew Good Yew, ie the deceased was dead;

(ii) that she died as a result of the injuries inflicted upon her;

(iii) that the injuries were inflicted by the respondent;

(iv) that the injuries were caused by the respondent with the intention of causing death or with the intention of causing bodily injury to the deceased which was sufficient to cause death.

[26] He pointed out that it was not disputed that Lee Good Yew, the deceased is dead as a result of the injuries inflicted. It was also not disputed that the injuries were inflicted by the respondent. He submitted that intention is a matter of inference. He stressed that there is evidence of intention to cause bodily injury, that the respondent was conscious of what he was doing and that he could respond to the surroundings and react.

[27] At the conclusion of the case for the prosecution, the learned trial judge made the following finding:

> I am satisfied that the prosecution has made out a prima facie case of murder (under s 300(d)) against the accused.

[28] He then called upon the respondent to enter on his defence.

[29] The respondent, the then executive director of a company named Green Mountain Holdings (M) Sdn Bhd ('the company'), who elected to give evidence on oath said he got up late in the morning on the day of the incident and had breakfast consisting of Milo with condensed milk and a teaspoon of glucose and toasted bread with peanut butter. He then drove himself to his office in his Volvo car to attend a meeting and arrived there after 11am. The meeting ended at about 1.45pm. After the meeting he went with three other directors of the company to the said restaurant. They ordered food consisting of fish, vegetables, omelette with prawns and onions, rice, chinese tea and beer. He consumed a few glasses of beer. On his drinking habits, he said:

> My normal capacity for beer is quite low. It is about six glasses. It is a bulky and gassy drink. So my maximum is about six glasses. If I had a choice of drinks to take for lunch I would take beer. In the evening it is normally whisky. After a game of golf also I take beer. With a Western dinner when wine is served I would complement it with brandy.

[30] The respondent said from the point of time he had lunch he could not remember what happened after that. He claimed he could not remember the time he left the said restaurant, how he left the said restaurant, whether he drove or somebody else drove him and whether it was during the day or night. He however stated he could remember the clothes he was wearing that morning which was a golf T-shirt and a pair of long black pants. He then said:

From the point of time I had lunch, I cannot remember what happened after that. My next memory is waking up at some police station. I was handcuffed. Officers in plain clothes were holding me. They were around me. They wanted to take me somewhere. I think to the hospital. At that time, I did not know where they were taking me. I did not know in which police station I was in. I did not realise the clothes I was wearing. I cannot remember whether I was wearing my footwear. I was not aware whether I was wearing my own clothes. Subsequently, I know where I was taken. I was taken in a van. Subsequently I arrived somewhere. I presume it was the hospital. I presume it was the hospital, as where else would they be taking me? At this place, I was shown to an Indian lady. She was somebody there. She wanted to take my blood sample. I did not know whether she was a doctor. I vaguely remember having seen SP8 on that night. This was the Indian lady I was referring to. I cannot remember what else she did.

I remember being pricked by a needle. I cannot remember anything else in relation to that. I do not remember urinating for urine sample to be taken. I do not remember signing any consent form for blood and urine samples to be taken. I do not remember signing a consent letter at the police station. I do not remember having any conversation with the Indian lady. I remember the evidence given by SP8 on P17. (P17 dirujuk kepada saksi) This is my note. I can recognise it as my handwriting. It is a bit untidy as compared to my normal. I remember writing the note. I also remember asking someone to contact my wife. I cannot remember who I asked. Prof Ernest Yeoh was in charge of the Accident and Emergency Unit of the Universiti Hospital in Petaling Jaya. At the time I wrote the note I assumed I was in the Universiti Hospital and the doctor known as Prof Yeoh. As far I am concerned Prof Yeoh was working at the Universiti Hospital on the day of the incident. I did not know that he had been transferred to the GH. Prof Yeoh is a friend of mine for 20 years. He had arranged for me to do certain medical tests previously at the Universiti Hospital. The telephone number on P 17 is the telephone number of my wife. I wanted to contact her because as a responsible person I must tell her that I have been arrested so that she can help me. I contacted her as I am very close to her. We have no children. She would have been worried as I had not gone home. The 'Musa Hitam' in P17 is Tan Sri Musa Hitam, the former Deputy PM. He is a friend of mine. I remember shouting to some people in a room to call my wife. I don't know where the paper (P17) came from but it is my note. In the hospital, I do not remember whether the handcuff was on or not.

[31] The respondent claimed he has low blood sugar and since 1991 has been taking glucose constantly with his drinks. With regard to his consumption of alcohol on the day of the incident, the respondent said:

On 22 August 2000 by taking six glasses of beer I believed I will not get drunk. My limit would be six glasses. Beer is a bulky drink. The alcohol content is less. Beer is called the long drink. I have not tried more than six glasses. If I have taken more than six glasses on that day I cannot remember.

[32] With regards to the lunch on the day of the incident, the respondent said:

While taking lunch on that day I did not feel weak or drowsy. After that I cannot remember what happened. I am afraid I have no explanation. I would not agree I purposely do not want to remember. If the lunch finished at 3 o'clock I would remember. It is not that I do not want to remember purposely. It is not true that I purposely do not want to remember. It is also not true that I purposely do not want to recall the shooting.

[33] In relation to the incident, he said:

I must have driven the car but I don't know how I landed at Jalan Istana Baru. A

I admit to having lunch and some beer on that day. But as to whether I was high driving to Jalan Istana Baru I cannot remember. I cannot remember driving. I cannot remember whether I came out of the car looking for someone to help me. I can't remember trying to stop a motorcyclist and that he refused to stop. I can't remember whether I got angry and shot in the air. I can't remember going to taxi driver then. I can't remember pointing the gun at the taxi driver and saying 'Good'. I can't remember whether I was trying to warn other cars to watch out for my car on the road. I was not concerned of the situation I was in. I can't remember that I shot the deceased because she refused to obey me. B

[34] He later said: C

On that day I cannot remember shooting at anyone. It is not true that I was highly intoxicated. I did have some beer. At the initial stage of the lunch I was conscious. I cannot remember shooting the lady.

[35] DW5, the current executive director of the company said he has known the respondent for about 20 years. He claimed he had seen a tin of glucose on the respondent's table in the office. He was at the lunch on the day of the incident and was with the respondent at the said restaurant till about 7pm. He cannot remember the number of glasses of beer that the respondent drank. He said the respondent went to the toilet about three to four times and that the respondent was not affected by the drinks. He said: D E

When the accused left the restaurant he looked okay. When Kenny left he was normal. At 7pm, Kenny's speech was as usual. Throughout the lunch till 7pm his behaviour was usual. He did not misbehave in any way at the lunch. At 7pm, we left together. I saw Kenny walking towards his car. That was the last I saw Kenny till I heard of the incident. F

[36] DW4, the respondent's wife testified that at about 7.15pm on the day of the incident, the respondent called her on the telephone and said that he was on his way home and told her not to worry. At about 9pm the same day, she was informed by the police that the respondent had shot somebody. G

[37] The defence called two doctors who had attended to the respondent in the past, namely, Dr Ridzwan Abu Bakar (DW2) and Dr Thiagi Selvayanagam (DW6).

[38] DW2, a cardiologist attached to the Pantai Medical Centre, Kuala Lumpur claimed the respondent first sought his professional advice on 23 October 1991. He concluded that the respondent had 'a low fasting blood sugar of 71 milligrams per cent (that would be 3.0 millimole per litre)'. The respondent made a second visit on 30 October 1991and on that day, 'in view of the low blood sugar he was given oral glucose by hospital staff under my advice'. He said low blood sugar is hypoglycaemia and on that visit he was impressed 'by the dramatic recovery he made following the taking of oral glucose'. He said: H I

I am quite familiar with hypoglycaemia. A hypoglycaemia patient can behave in a bizarre way. It can vary from confusion to aggression right up to coma.

[39] Under cross-examination, he clarified that on both occasions he diagnosed the respondent as having provisional hypoglycaemia and on the second visit, his symptoms disappeared within minutes after he took glucose. He also said the following:

> A hypoglycaemia patient can be confused and aggressive. In the mild stage the patient will be conscious. That is when he will have the symptoms. The symptoms will be related to the degree of hypo. The early symptoms will include trembling, sweating, palpitation, lethargy, drowsiness, chest pains. The next stage will be (pallor) ie (paleness), confusion, irritability. At this stage he will be conscious. There will be hunger at this stage as the body system is trying to supply the sugar. At the mild stage walking will be normal. At the second stage there will be in coordination in walking. A person in the second stage can drive a car. If there is no treatment at the second stage by the body's resources then the hypoglycaemia proceeds to the third or severe stage. At this stage the patient will have convulsions, coma and death. There is action on the part of the patient only on the first and second stages. A patient will become aggressive at the second stage. Aggression can take many forms even if they are not restrained. At that stage, he will be conscious. It is possible for a patient to go straight into the second stage and become aggressive without the first stage symptoms.
>
> A person with a blood alcohol level of 198 milligram can be considered as a person under the influence of alcohol. That level is high. It is beyond the legal requirement of 80 mg. A person with alcohol level of 198 will have symptoms dependent on his tolerance level.
>
> A person with alcohol smell can also be suffering from hypoglycaemia. What I mean is that the hypoglycaemia can be another factor in addition to the alcohol influence. The alcohol could have induced the hypoglycaemia.

[40] Under re-examination, he said:

> I am aware that hypoglycaemia in a person can produce psychogenic disturbances such as the fuge stage of mind like walking like an automation without knowing.

[41] DW6, a general local practitioner said he first met the respondent as a patient on 31 May 1990. They later became friends and played golf together. He also said:

> On occasions I have had drinks and dinner with Kenny. I have seen him drinking alcohol. Generally it is whisky. I have seen him holding himself very well after 7–8 glasses of whisky. I have not seen him drinking beer.

[42] Under cross-examination, he said:

> It was established in 1991 that accused had hypoglycaemia.
>
> Kenny was not a known diabetic. To be hypoglycaemic one must be a diabetic. In 1990 his blood sugar was normal.
>
> On 12 November 1998 when I wrote hypoglycaemia leading to syncope on D91. I was referring to the finding made earlier by Dr Ridzwan. I myself have not confirmed it by doing a random blood sugar test during an episode.
>
> A person who has a fasting blood sugar ranging from 5.5 to 5.7 is not a diabetic unless a glucose tolerance test proves otherwise. In this case I did not take the blood level of accused's during an episode. I did not know that Dr Ridzwan has made a finding of provisional low blood. On each occasion accused came to see me he had hypoglycaemia. The cause of the hypoglycaemia has not been established.

[43] The respondent also called four experts in their respective fields, namely, Dr Vincent Marks (DW3), Dr Elizabeth Rajan (DW7), Harcharan Singh Tara (DW8) and Dr M Mahadevan (DW9) who expressed their opinion on the medical condition of the respondent at the time of the incident based upon the medical reports introduced at the trial and the notes of evidence of the trial.

(i) Dr Vincent Marks (DW3)

[44] DW3, a doctor of medicine and currently Professor Emeritus of Clinical Biochemistry in the University of Surrey said 'Hypoglycaemia merely means low blood sugar' and that 'hypoglycaemia is not a disease'. He also said:

> I have had observations with people who were in hypoglycaemic state of which they have absolutely no recollection after I have brought them around by giving them glucose.
>
> I cannot say at what level of blood glucose one must be in order to be unaware. I would not classify a figure of 3.9 as diagnosing hypoglycaemia.
>
> In my experience with hypoglycaemia patients they find it hard to believe when told of the events that had occurred while they were suffering from hypoglycaemia.

[45] Under cross-examination, he said:

> In the present case I was not specifically asked to comment on alcohol-induced hypoglycaemia. There is a specific condition called alcohol-induced hypoglycaemia. I do not think the accused suffered from that.

(ii) Dr Elizabeth Rajan (DW7)

[46] DW7, an endocrinologist attached to Hospital Lam Wah Yee, Penang said she studied the medical reports and notes of evidence relating to this trial and gave the following opinion:

> On the facts of this case that I have studied the episode culminating in the unfortunate shooting of the victim is consistent with the claim of an hypoglycaemia attack. I cannot say that it is definitely hypoglycaemia attack because we have no measurements of Mr Lee's blood sugar during the episode nor was he given glucose at the time of the attack. I can only say that it is possible it is an hypoglycaemia episode.

[47] Upon being asked, under cross-examination, as to whether the respondent was suffering from alcohol intoxication on the day of the incident, DW7 answered as follows:

> Accused had alcohol but alcohol intoxication cannot explain some of the evidence given by witnesses at the scene. If he was intoxicated he would not be able to drive a vehicle without incident on a strange route. This was not his normal route. And through two toll bridges. A person intoxicated is unlikely to have done that because his blood alcohol level would be in the region of 300mg at about 7pm. This is my assumption.

[48] Upon being asked as to whether she agree that the respondent can be said to be under alcohol intoxication at about 8pm on the day of the incident, she answered

in the affirmative. She however later said that 'my interpretation of the events is that the accused suffered a hypoglycaemia episode that began at 6.30–7pm with the blood sugar reaching its lowest point at about 8pm and the gradual recovery occurring between 10 and 11 o'clock'. She also said 'I disagree that accused was under influence of alcohol' and the respondent's behaviour at 8pm 'is more suggestive of hypoglycaemia than alcohol intoxication.'

(iii) Harcharan Singh Tara (DW8)

[49] DW8, a former Government chemist and now practising as a 'Chemico-Legal & Forensic Consultant', was engaged by the defence to prepare an opinion to determine what would have been the blood alchohol level of the respondent at 8pm on the day of the incident. He was of the view that 'at about 8pm the blood alcohol level in the accused's body would have been ranging from 92–119mgs/100mls'.

(iv) Dr M Mahadevan (DW9)

[50] DW9 was in the Malaysian Mental Health Service from 1967 to 1984 in the Ministry of Health. He was appointed Chief Psychiatrist for the Ministry of Health and was the director of Hospital Bahagia. He is now a consultant psychiatrist. He first met the respondent on 30 August 2000, ie, eight days after the incident in the court lock-up and stated that the respondent mentioned to him 'his medical condition relating to hypoglycaemia'. He was of the following opinion:

> In the case of the accused, it is a hypoglycaemic attack. The behaviour of the accused in shooting and generally behaving bizarre has no possibility of it recurring to the extent as happened in this case. This is because it would not be possible to simulate the constellation of factors that gave rise to this severe hypoglycaemia and the bizarre behaviour. It is also difficult to have the same social circumstances as happened here like the food, the mood and the hormone that brought about this behaviour on that day.

[51] He later said he was '100% sure that the accused had hypoglycaemia on the 22nd ' and denied that the cause of the respondent's behaviour was intoxication.

[52] At the close of the defence case, the court allowed the learned Deputy Public Prosecutor to call rebuttal evidence on the issue of hypoglycaemia and the psychiataric evidence and for this purpose called Dr Norsinah Kamaruddin (PW18) and Dr Abdul Aziz Abdullah (PW19). In allowing this application to call rebuttal evidence, the learned trial judge prepared and delivered a separate grounds of decision (see *Public Prosecutor v Kenneth Fook Mun Lee @ Omar Iskandar Lee bin Abdullah (No 1)* [2002] 2 MLJ 563). After discussing the law, he said (at p 575):

> It is now apposite for me to deal with the application made by the prosecution to call witnesses to rebut the defence of hypoglycaemia mounted by the accused. My ratiocination of the law will reveal that if the accused carries a legal burden to establish the defence then the prosecution has a right to call evidence in rebuttal unhindered by any restrictions. *The crux of the defence case is that at the time of commission of the offence the accused was undergoing an hypoglycaemic attack and was therefore in a state of automatism.* Automatism

refers to a state of defective consciousness in which a person performs unwilled acts. It may be caused by concussion, sleep disorders, acute stress, epilepsy and other ailments like hypoglycemia.

(Emphasis added.)

[53] In conclusion, the learned trial judge said (at p 576):

On the facts of this case, and without in any way pre-judging any part of the case at this stage, the evidence shows that the cause of the accused's alleged low blood sugar and the resultant hypoglycaemic attack is not known. It is not caused by any medication and there is no evidence of it being caused by any external factor. It is prone to recur. *I am therefore of the view that the abnormality of the accused must be classified as insane automatism.* His defence will thus fall within s 84 of the Penal Code. The result is that the burden is on him to establish his condition of mind at the time of the commission of the offence. The prosecution is therefore entitled to adduce evidence in rebuttal. The defence may adduce evidence in surrebuttal if there is a need for it.

(Emphasis added.)

(i) Dr Norsinah Kamaruddin (PW18)

[54] PW18 was the consultant physician and endocrinologist at the General Hospital before she became the head of the Department of Medicine in Putrajaya. As head of department, she is also the senior consultant physician as well as endocrinologist. The areas of work that she covered are that of diabetes, endocrinology and general medicine. She based her opinion on the respondent's medical background on the notes given to her. She said it is extremely rare to have clinically significant hypoglycaemia in otherwise healthy individuals and 'healthy individuals mean that the person is not malnourished, his organs are functioning well ie good liver and renal function, his adrenal glands are intact and he is not in a prolonged fasting state'. She explained that the body gets its supply of glucose from food, predominantly carbohydrate and this is from regular meals and food is able to provide glucose for six to seven hours; once a person eats a meal he should have a glucose supply forsix to seven hours.

[55] She was of the view that a person who had lunch at 3pm cannot experience a hypoglycaemia condition immediately after that. Based on the notes of evidence and the laboratory results made available to her, she found the respondent to be a healthy person, viz., his last liver function test was normal and his kidney function test was normal. In relation to hypoglycaemia, she said:

His blood glucose was documented on 4 times as 5.5, 5.7, 5.6 and 1 fasting glucose of 5.6. A 3.9 reading was documented by Dr Ridwan (DW2) in October 1991. That was a random blood test. This is based on D85. (Witness referred to D91). I have looked through this. I observed on 3 occasions the accused had been diagnosed as having heartburn. On one of these notes dated 19.11.1998 it was written as hypoglycaemia. However, as a clinician it is inappropriate to put a diagnosis without supporting evidence of history or symptoms or physical examination or further tests to support the diagnosis. In this particular note there was none of the three except for the word 'syncope' which is a non-specific symptom. And with the additional note by Dr Thiagi (DW6) that the patient was advised to see

A Dr Ridzwan (DW2). Syncope can be due to many causes such as rhythm disturbances of the heart, low blood pressure, volume deficient, valve disease of the heart and, less commonly, hypoglycaemia. I find the note quite confusing. It was only documented as hypoglycaemia leading to syncope and advised to see Dr Ridzwan (DW2). As a physician, I find this statement rather confusing as there was no further documentation of blood pressure, pulse rate, appearance of patient or, at the very least, an ECG or finger-print B testing of the blood glucose.

[56] PW18 was of the view that if a person had been severely hypoglycaemic leading to unconsciousness, he would not wake without assistance. In relation to the evidence that the respondent had slept in the police station and had defecated in his C trousers whilst at the police station on the night of the incident, she said:

From what I read I cannot be certain whether he was sleeping or unconscious. However, he was able to wake up within an hour later spontaneously and able to converse and he was apparently coherent enough to be understood or to give instructions. If a person had been severely hypoglycaemic leading to unconsciousness he would not wake up without D assistance.

There is no strong evidence towards a seizure because there was no witness and there was no suggestion that the accused had bitten his tongue which is a common occurrence in a seizure. The defecation in the pants is not specific at all and I would consider other metabolic problems he had at the time which is the alcoholic intoxication. I am stating this E based on the blood alcohol reading of 198g. The other supporting evidence which makes the alcoholic intoxication likely is that the accused was able to wake up on his own and have a conversation and remained conscious even at the hospital. The behaviour of the accused is not inconsistent with alcohol intoxication when he was described as aggressive and yet coherent and able to give some instructions to contact some people he knew and was able to write on a piece of paper legibly which would not be in keeping with a person who is F severely hypoglycaemic.

[57] When asked by the learned Deputy Public Prosecutor as to what would the effect be on the respondent if he actually had amnesia from 3pm onwards on the day of the incident and that that was the cause of hypoglycaemia, PW18 said:

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The sequence of events would be that he would progress to the inability to carry out complex or coordinated task. He would be incoherent in his speech and movements. He would be confused and drowsy and progress to coma several hours later.

H **[58]** The learned Deputy Public Prosecutor also asked the following questions:

Q: In this case the accused went to the toilet, paid his food bill, went through the toll, drove his car, made a call to his wife. Is that consistent with someone having severe hypoglycaemia?

A: No, it will not be consistent with a severe hypoglycaemia because at such a stage of hypoglycaemia even if one were to drive one would not be able to coordinate well and would I be knocking into nearby objects. There was no such evidence in this case. His car was alright when he was arrested.

Q: The accused stopped his car, took out his gun, stopped a motorcyclist and said good. Later stopped a Perdana and fired a shot, then walked to an army jeep and shot and responded to the public. Can a person in hypoglycaemic condition perform such acts?

A: A person with severe hypoglycaemia will not be capable of coordinating himself much less coordinating others around him and he may also be incoherent. A general act of aggressiveness would not be different hypoglycaemia from other causes. By incoherent I mean instructions given cannot be understood.

If the behaviour of the accused on that day was hypoglycaemia the recovery he had will be a full recovery and he will be his normal self. That is because the hypoglycaemia would have been corrected. Thus the behaviour of the accused after he recovered in the police station and thereafter is not consistent with hypoglycaemia. So one has to consider other causes for the aggressiveness. In this instance based on the evidence of Dr Bhawani the most obvious other cause is the alcohol intoxication. That is more in keeping with the symptoms.

As a clinician, in order to distinguish between intoxication and hypoglycaemia, one has to fall back on the biochemical evidence because of the overlap of the symptoms. By biochemical evidence I mean blood tests.

In this case given that the accused was nutritionally healthy, he had two meals, he had very good liver and renal functions it would have been extremely unlikely for him to have had hypoglycaemia at 1.30 in the morning. It is even less likely that he had hypoglycaemia at 7pm because he was not in a fasting state. There is no strong evidence to suggest that accused had hypoglycaemia at about 7pm. So one has to find other causes for his behaviour.

What I mean by chronic drinking is the regularity of consumption and the duration of consumption although I am no expert in alcohol. Heavy drinking to me means having the 5–6 glasses of beer on some days and 5–6 whiskies as I have noted from Dr Ridzwan's notes per day. Some regular moderate to heavy drinkers do end up with liver disease. But I have seen some who do not have chronic liver disease. I am not sure why there should be individual differences. As a physician I must fall back on the clinical data and interpretation and not solely on history alone. So I still say that accused was a healthy person. I say the accused has a high tolerance level for alcohol because compared to an alcohol naive person he is able to have moderate to heavy drinking almost daily and based on the testimonies he was able to drive or conduct meetings and had not had anti-social episodes or bizarre behaviour. I rationalise the actions of the accused on that day based on his habitual drinking pattern and being able to do tasks previous to the event and that there is no truly convincing evidence of hypoglycaemia prior to that date. If accused was in a hypoglycaemia state the natural compensatory response of the body is preserving the brain. Therefore blood glucose utilisation will be very much reduced by the muscles, kidneys etc and hence the muscular or the physical aspect or physiologic process of peripheral tissues other than the brain will be reduced to a minimum resulting in the expected weakness of the muscle at the very least to some degree. This somehow is not shown by the accused based on the testimony of witnesses.

(ii) Dr Abdul Aziz Abdullah (PW19)

PW19, a psychiatrist attached to the Department of Phsychiatry, Hospital Kuala Lumpur as head of department who examined the respondent on 8 October 2001 informed the court that the respondent 'denied any past history of psychiatric illness or any significant medical problem'. He was of the following view:

Taking into account his history, examination and testimony in court at the time of the incident the most probable diagnosis was alcohol abuse in intoxication.

A fuge state is defined as a phenomena or syndrome which involves transient loss of memory and sense of personal identity accompanied by a period of wondering.

On the facts of this case it is most unlikely that the accused was in a fuge state. When there is a probable cause which can be described as contributory to the state, as in this case

intoxication, fuge state is almost always excluded. In this case alcohol is important as there was alcohol consumption prior to the event and the subsequent blood reading.

[59] In relation to the evidence given by Dr M Mahadevan (DW9), PW19 said he found it difficult to agree with DW9's view that the respondent was definitely hypoglycaemic. He also said 'with the history of the accused and the sources available now I am still not convinced of hypoglycaemia.' He was also of the view that DW9's report which was submitted to the court was based on several assumptions. He said:

> In psychiatry, particularly in forensic psychiatry, final diagnosis is based on facts physical and mental status examination and laboratory findings. There are specific criteria for us to consider in making a definitive diagnosis. Provisional diagnosis may be entertained but has to be supported by evidence which I find difficult to find in the report.

[60] The defence did not adduce any evidence in surrebuttal.

[61] At the conclusion of the trial, learned counsel for the respondent contended that hypoglycaemia negates *mens rea* and in order to amount to a crime an act must be voluntary. Counsel then said:

> Our defence is hypoglycaemia. It has the same symptoms of intoxication. Therefore the defence feels compelled to submit on intoxication.

[62] Counsel then went on to invite the court to revisit the issue of s 300(d) of the Code and argued that s 300(d) 'requires a high level of knowledge'.

[63] A gist of the contentions canvassed by the defence at the conclusion of the trial is as follows:

(a) the defence of hypoglycaemia negates the existence of the mens rea element of the offence of murder;

(b) if the court does not accept the first submission above, the defence contends that hypoglycaemia falls under s 84 of the Code and hence the respondent should be acquitted and discharged on the ground of unsoundness of mind;

(c) as an alternative to the first and second submission, there is adequate evidence to show the conduct of the respondent in causing the death of the deceased was probably caused by intoxication within the meaning of ss 85(1), (2)(b) and 86(1) of the Code;

(d) if the court rejects the first, second and third submission, there is sufficient evidence to reduce the charge of murder to culpable homicide not amounting to murder under s 304(b) of the Code.

[64] In the course of submissions at the conclusion of the trial, the learned trial judge posed the following issue to the learned Deputy Public Prosecutor and learned counsel for the respondent, namely:

> The issue is the manner of ascertaining intention where intoxication is in issue. Does it straight away negate intention or whether a finding of intention must be made before considering intoxication.

[65] In response to the issue posed by the learned trial judge, the learned Deputy Public Prosecutor argued, inter alia, that it would only be an issue if the defence of intoxication had been specifically raised or indicated by the defence. He pointed out that from the very beginning of the case, the defence had gone on hypoglycaemia and intoxication was never made an issue. He further argued that if it had been raised, the manner of assessing the evidence would be different and that if the defence has not raised a defence, the court cannot consider it at the close of the case for the prosecution. The learned Deputy Public Prosecutor then went on to submit that s 300(d) of the Code applied on the facts of the case. He argued that the respondent acted voluntarily and was conscious of what he was doing.

[66] In arriving at the decision that he made at the conclusion of the trial, the learned trial judge said he is unable to agree with the submission of the prosecution that the facts of the case disclose a case under s 300(d). The learned trial judge held the respondent had failed to establish that he was undergoing a hypoglycaemic episode at the material time and in the light of that finding, the 'alternative defence submission of intoxication becomes a live issue'. He then said:

> The circumstances in which the shot was fired therefore go beyond mere knowledge and it must be inferred or presumed that it was done so intentionally. Thus the facts of the case fall within s 300(c) where intention is in issue. Clause (d) only applies where no other part of s 300 is applicable. Thus in a case like this where the intention of the accused as inferred from the result of his act could at least be that of causing such bodily injuries as the accused would have known to be likely to cause death clause (d) will have no application.

[67] The learned trial judge subsequently said:

> The *presumption of the absence of intoxication* which facilitated a finding that the accused acted with *intention* as envisaged by s 300(c) is displaced by the evidence of *intoxication on record* to show that he *did not have the requisite intention*. This means that the act of the accused which gave rise to an inference of intention has been rebutted. However, the fact remains that it is a case which initially fell under s 300(c). It is on that basis that *s 86(2) became applicable*. It is also on that basis that clause (d) became inapplicable. However, *the facts are sufficient to make out a case under s 304(b) which does not require an intention to cause death or to cause such bodily injury as is likely to cause death*.
>
> (Emphasis added.)

[68] He then decided that the respondent was guilty of an offence under s 304(b) of the Code.

[69] In canvassing the appeal before us, the learned Deputy Public Prosecutor submitted that the learned trial judge had made a 'U-turn' at the conclusion of the trial. In relation to the issue raised by the learned trial judge during the submission stage at the conclusion of the trial, viz., 'the manner of ascertaining intention where

intoxication is in issue', the learned Deputy Public Prosecutor pointed out he had submitted that that issue raised by the court would only be an issue if the defence of intoxication has been specifically raised or indicated by the defence. He contended that the learned trial judge should have considered the applicability of s 300(d) of the Code at the close of the defence case as he rightly did at the conclusion of the case for the prosecution and that if he had done so, he would not have come to any other conclusion other than the applicability of s 300(d), viz., that based on the evidence adduced and the facts found therefrom that he cannot come to any other conclusion other than the establishment of the case under s 300(d) and s 302 of the Code accordingly.

[70] The learned Deputy Public Prosecutor submitted except for cases falling under s 85(2) and s 86(1) and (2) of the Code, intoxication is not a defence to any criminal charge and hence the presumption that an intoxicated person had the same knowledge as he would have had if he had not been intoxicated is still preserved by the provision. He also pointed out that s 85(2) of the Code was never raised by the defence and that s 86(2) does not apply in cases involving intention, specific or otherwise and hence, the issue of intention is not relevant in the present case.

[71] We find it convenient at this stage to reproduce ss 85 and 86 of the Code:

> 85 (1) Save as provided in this section and in s 86, *intoxication shall not constitute a defence to any criminal charge*.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> 86 (1) Where the defence under sub-s 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), the provisions of s 84 of this Code, ss 347 and 348 of the Criminal Procedure Code shall apply.
>
> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> (3) For the purpose of this and the preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

[72] The learned Deputy Public Prosecutor submitted even if the respondent was, at the time of the incident, under the influence of alcohol, that does not absolve him. He pointed out even the learned trial judge, in his grounds of judgment said, 'As I have explained earlier the fact that he was in a state of intoxication does not exclude him from liability under cl (d)'. The learned Deputy Public Prosecutor submitted that another point of importance is the learned trial judge rejected the defence of hypoglycaemia and automatism and the reason for the rejection is that the

respondent was sufficiently conscious of what he was doing at the time of incident; this, the learned Deputy Public Prosecutor argued, permeates throughout his judgment, for example:

(i) 'The sequence of event indicates that he had sufficient mental capacity to be responsive enough to make a decision' (p 597 of the appeal records);

(ii) 'I would therefore hold that the accused was sufficiently conscious of what he was doing when he fired the fatal shot as a result of decision made by him following a refusal to obey his instructions' (p 599 of the appeal records);

(iii) 'He was in a position to decide when to fire and when not to. He was therefore conscious of what he was doing. The conduct of the accused firing the shot shows that it was done with absolute callousness towards the result' (p 446 of the appeal records).

[73] Upon the above premises, the learned Deputy Public Prosecutor prayed that the conviction under s 304(b) of the Code be set aside and substituted with an offence under s 302 of the Code as originally charged and that the respondent be sentenced accordingly.

[74] In his grounds of judgment, the learned trial judge gave the following reasons as to why he was satisfied at the conclusion of the case for the prosecution that it had made out a prima facie case of murder under s 300(d) of the Code against the respondent. He observed that s 300(d) of the Code requires proof of the following ingredients, namely:

(a) the person committing the act must know that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death; and

(b) the act must have been committed without any excuse for incurring the risk of causing death, or such injury.

[75] He held that the prosecution had established both ingredients. He said knowledge is an awareness of the consequences of an act and that it is a mental act and must be inferred from the facts and circumstances of a particular case. He further said the nature of the weapon used is also a matter to be considered to determine the state of mind of a person at the time of the offence. He then went on to consider the facts of the case as follows:

> I then considered the facts of the case in order to determine whether the accused had the required knowledge. When the motorcyclist sped off he fired two shots in the air. When he stopped PW4 he did not fire as PW4 had followed the instructions that were given. He then knocked at the windscreen at the driver's side of the window of the Perdana asking the driver to come out. He only fired after the person refused to open the door of the car. It was a response to his orders not being obeyed. The shot was fired at point blank range at the front windscreen of the car. If the door had been opened the accused would not have fired the shot just as in the case of PW4. He was in a position to decide when to fire and when not to. He was therefore conscious of what he was doing. The conduct of the accused in firing the shot shows that it was done with absolute callousness towards the result. It was in general disregard for human life and safety. This clause is usually applied in such cases (see *Janardan*

Prasad v State of Rajasthan 1977 Cr LJ 68). The use of a firearm by the accused is significant. It is a lethal weapon. Where a shot is fired at a person there is a strong probability that it will cause death or such bodily injury as is likely to cause death. This is particularly so in this case bearing in mind the circumstances in which the shot was fired at the deceased. The shot was fired from outside at the deceased who was seated inside the car. Obviously it will hit the upper part of the body of the deceased where the vital organs are. Accordingly the bullet fired by the accused hit the chest area of the deceased and PW16 said that the injuries sustained were necessarily fatal. Firing at a person at close range with a pistol in the circumstances as in this case is an evident risk to human life. It is a risk which is both threatening and near. It amounts to an act which is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. As Wanchoo CJ said in *Kanji v State* (1953) CLJ 434 at p 435:

> We are, therefore of the opinion that where a person takes the risk of shooting at another the act would ordinarily be an imminently dangerous act which must in all probability cause death or such bodily injury as is likely to cause death and the case would be covered by the fourth clause in s 300.

[76] The learned trial judge also held that the prosecution had established that the act of the respondent was wholly inexcusable. On this ingredient, he referred to *The Penal Law of India* by Dr Sir Hari Singh Gour (11th Ed) Vol 3 at p 2458 which reads:

> The expression 'without any excuse' means without any exculpatory circumstances other than those mentioned in the five exceptions to this section. The word 'excuse' here means something which is a justification of the act and does not merely mitigate the crime.

[77] The learned trial judge found the respondent shot at the deceased when she refused to open the door of her car and had absolutely no reason to do so and that in such circumstances, the firing of the shot at her is wholly inexcusable and does not fall within any of the exceptions enumerated in s 300 of the Code.

[78] With regards to the evidence of PW13, in relation to the respondent's blood alcohol level, the learned trial judge observed that blood alcohol level itself is not conclusive to determine the degree of intoxication of a person. To lend support to this observation, he referred to *Public Prosecutor v Ramasamy a/l Sebastian* [1991] 1 MLJ 75 at p 81 where Chao Hick Tin JC said:

> In any event, from the evidence of the experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused. Different people react differently to the same blood alcohol level. It makes a great difference whether the person is or is not an experienced drinker. In our judgment, and here we accept the opinion of Dr Chan (PW15), the more reliable indicator of the state of mind of the accused must be the conduct of the accused immediately prior to and after the offence.

[79] The learned trial judge in the instant appeal was of the view that what is more pertinent is evidence of the state of mind of the respondent at the material time. In relation to this view he said:

> The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence. I say this because what is in issue is the effect of intoxication on the state

of mind of the person in order to determine whether he could have formed the necessary intention. This is best reflected by his conduct and not the level of his intoxication.

[80] He then said it has been recognised that the mere fact that a person is intoxicated does not preclude him from forming an intention. He said:

As Stephone J said in *R v Doherty* 16 Cox CC 306 at p 308:

> A drunken man may form an intention to kill another, or to do grievous bodily harm to him, or he may not, but, if he did form that intention, although a drunken intention, he is just as much guilty of murder as if he had been sober.

A drunken man is presumed to have the capacity to form the specific intent necessary to constitute the crime, unless evidence is given from which it can reasonably be informed that he was incapable of forming it (see *Kennedy v HM Advocate* (1944) SC (J) 171; *Bratty v Attorney General for Northern Ireland* [1963] AC 386).

[81] In relation to the state of intoxication of the respondent at the material time as to whether he had formed the requisite intention, the learned trial judge concluded as follows:

… his intoxicated state was weighty enough to preclude him from forming the necessary intention in respect of the offence with which he had been charged. I was therefore satisfied that the conduct of the accused in firing the shot which killed the deceased militated against a finding that it was done so intentionally as required by clauses (a), (b) or (c) of s 300 pursuant to the application of s 86(2) to the facts of the case. I was therefore of the opinion that the case against the accused did not come within the ambit of these three clauses.

[82] Having dealt with the s 300(a), (b) and (c) of the Code, the learned trial judge then went on to consider the criminal liability of the respondent under s 300(d) of the Code. He was of the view that this clause is not intended to apply to cases in which a person intends to inflict an injury likely to cause death because it speaks of knowledge and not of intention of an injury likely to cause death and in support referred to *Behari v State* AIR 1953 All 203.

[83] Learned counsel for the respondent contended s 300(d) is confined in its operation to instances similar to that contained in illustration (d) of s 300, viz:

A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

[84] In relation to this, the learned trial judge was of the view that counsel's contention cannot hold water. He observed that illustration (d) refers to a situation where the act of the accused is directed against no one in particular. He said:

The issue for determination is whether this clause applies only to cases envisaged by the illustration. It must first be observed that illustrations to a section are not an exhaustive explanation of the operation of the section. They are merely useful guides to ascertain the

meaning of a section (see *Munah bte Ali v PP* [1958] MLJ 159; *Ramamoorthy v PP* [1948] MLJ 43). They cannot therefore be construed as constituting the section itself thereby controlling its whole meaning (see *Purshoftam Ishvar Amin v Emperor AIR* 1921 Bom 3). Thus in commenting on the clause The Penal Law of India by Dr Sir Hari Singh Gour 11th Ed Vol 3 says at p 2460:

> It has been stated before that this clause was intended to meet a case where the act of the accused is directed against no one in particular (see sec 299). But this is by no means necessary, nor, indeed should the clause be held confined only to such cases. For, there are cases in which a single individual may be the target of the accused's malice as in the case of the mother exposing her illegitimate child in the hope that it may be picked up but with the certain knowledge that its exposure will in all probability compass its death.

In considering the extent of the clause the Indian Supreme Court said in *State of Madhya Pradesh v Ram Prasad* AIR 1968 SC 881 that although it is usually invoked in those cases where there is no intention to cause the death of any particular person, as shown by the illustration, it may on its own terms be used in those cases where there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death. In that case it was held that the case of the accused fell within clause (d) when the accused's mistress died as a result of her dress being set on fire by him. In *Gyarsibai v State* 1953 MB 61 there were constant quarrels between the accused and her sister-in-law. In one of the quarrels the accused was asked to leave the house. Thereupon she took her three infant children and jumped into a well with them. She survived but the children died. It was held that it cannot be said that the accused did not have the knowledge that her act was so imminently dangerous as to cause the death of her children; it cannot be said that she was in such an abnormal state of mind that she could not have any knowledge of the nature of her act; the fact that the quarrels between the accused and her sister-in-law had made her life become unbearable cannot be regarded as a valid justification for her act of jumping into a well with her children. Accordingly, she was found guilty of murder under clause (d).

[85] The learned trial judge in the instant appeal then concluded he was satisfied that the facts are capable of coming within the ambit of s 300(d) of the Code and the fact that the respondent was in a state of intoxication does not exclude him from liability under s 300(d). He said:

> As I have explained earlier the fact that he was in a state of intoxication does not exclude him from liability under clause (d). In *Kanji v State* (1953) Cr LJ 434 the accused who was heavily drunk shot at a boy with a gun from a distance of about 10 paces and the shot struck the abdomen of the boy who died shortly afterwards. It was held that the accused was guilty of murder under this clause. In *Dil Mohammad v State* (1941) 21 Pat 250 where the injury inflicted by the accused person in a state of intoxication was of such a nature as any sober man must surely have known that the injury was likely to cause death and where the injury was sufficient in the ordinary course of nature to cause death, it was held that although the act was not intended to cause death, the offence was one of murder. In *Pal Singh v State* AIR 1917 Lah 226 it was held that where the accused persons who were under the influence of liquor assaulted the deceased and literally beat him to death with lathis without any direct motive they were guilty of murder as they must have known that their act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

[86] Based upon the above reasons, the learned trial judge ruled that he was satisfied at the conclusion of the case for the prosecution that the prosecution had made out a prima facie case of murder against the respondent under s 300(d) of the Code and called upon the respondent to enter on his defence.

[87] In his grounds of judgment, in relation to the case for the defence, the learned trial judge said hypoglycaemia is 'one of the ailments that leads a person to act in an automated state' and 'automatism refers to a state of defective consciousness in which a person performs unwilled acts'. He further said automatism 'is related to the requirement of voluntariness and *mens rea*'. In dealing with the question as to whether the respondent was in a state of automatism at the material time, the learned trial judge said:

> The facts of the case reveal that the accused fired two shots in the air when the motorcyclist sped away and at the deceased when she refused to come out of her car. He did not fire at PW4 as his instructions were obeyed. He fired at the deceased as she had disobeyed his instructions. If she had obeyed him he would not have fired the shot. He pointed the gun at the crowd only when they approached him. He had a telephone conversation with DW4 prior to the incident. This is something that he normally does when he returns home late as on that day. It is the conduct of the deceased that triggered the accused to shoot at her. He only fired at the deceased when his instructions were not obeyed. It was therefore not a random shot. This is supported by the fact that he did not fire at PW4 as his instructions were obeyed. The sequence of events indicates that he had sufficient mental capacity to be responsive enough to make a decision.

[88] Based upon the above observations, the learned trial judge held that the defence of automatism raised by the respondent cannot be sustained. He said:

> I would therefore hold that the accused was sufficiently conscious of what he was doing when he fired the fatal shot as a result of a decision made by him to do so following a refusal to obey his instructions. This means that not all the deliberative functions of his mind were absent. The corollary is that the shot fired by the accused at the Perdana is explicable without reference to his alleged state of automatism. His mind, though impaired, was working well enough to put into effect the thought that had got into him. He had therefore fired at the deceased in a voluntary, though impaired, state of mind. Thus the defence of automatism raised by the accused cannot be sustained. The case of *Broome v Perkins* (1981) 85 Cr AR 321 shows that the fact that a person suffered from hypoglycaemia is not a relevant matter for consideration if at the material time he was conscious of what he was doing. Ordinarily, therefore, it would be unnecessary to go any further in view of my finding.

[89] On the defence of hypoglcaemia the learned trial judge said:

> Be that as it may, it is necessary for me to determine whether the accused was indeed undergoing a hypoglycaemic episode at the relevant time in order to determine whether my finding of intoxication at the close of the prosecution case can be maintained. I have already ruled that automatism is not available as a defence to the accused. My ruling only means that he was aware of what he was doing. That does not mean that he was not suffering from hypoglycaemia as a person undergoing an episode may still be aware of what he is doing. As DW3 said a person who suffers from hypoglycaemia need not necessarily go into automatism. If it is found that there is no evidence to show that the accused was suffering

A from hypoglycaemia it will explain the impaired mind of the accused and thereby facilitate a finding that he was intoxicated at the material time. Intoxication was the alternative submission made by the defence. Thus what is required is a consideration of the sufficiency of the evidence adduced by the defence to determine whether the accused did in fact suffer from hypoglycaemia.

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[90] The learned trial judge then went on to deal with the evidence of DW2 and DW6, ie, the two medical practitioners who attended to the respondent previously and also the opinions forwarded by DW3, DW7, DW8 and DW9. He noted that DW3, DW7 and DW9 based their evidence on the findings of DW2 and DW6 and the behaviour of the respondent at the time of the incident whilst DW8 gave his C views on the state of intoxication of the respondent at the time of the incident. The learned trial judge even found that certain entries made by DW6 in his clinical notes when he attended to the respondent were suspicious in view of inconsistent answers given by DW6 in relation to it. Based upon the evidence, he said:

D My findings on the evidence of DW2 and DW6 coupled with the admission made by the accused mean that there is no evidence to show that the accused had a history of hypoglycaemia.

[91] In view of my findings on the evidence of DW2 and DW6, the opinions E expressed by DW3, DW7 and DW9 must be assessed against that background. It is pertinent to observe that a large part of the evidence of DW3 and DW7 is based on the evidence of DW2 and DW6 while the evidence of DW9 is based, in addition, on other factors including interviews he had with the accused. Such evidence is not of much value compared with the evidence of doctors who had attended to the patient (see *Gopessur v Bissessur 16 CWN 265*; *Monosseh v Shapurji* 10 Bom LR F 1004). As *Sarkar on Evidence* (15th Ed) says at p 901:

Opinion of medical men based on hearing the evidence of other witnesses without observing facts is not of much value. Thus opinion of doctors based mostly on prescription and on their general knowledge of the course of a disease are always indirect evidence and not of much weight when compared with the evidence of doctors who personally attended the G patient (*Hari Singh v Lachmi* 59 IC 220; 12 PLR 1921).

[92] The learned trial judge subsequently rejected the evidence of DW2 and DW6 which he said means 'that the foundation of the evidence of DW3, DW7 and DW9 has been destroyed insofar as it is based on the evidence of DW2 and DW6 thereby H rendering that part of their evidence worthless'.

[93] The learned trial judge said the burden of proof to establish hypoglycaemia on a balance of probabilities is on the respondent and the evidence led must meet the required standard. He then held the evidence of DW3 and DW7 where they say that I their conclusion is only a possibility is of no avail. He also held that DW9's evidence that he is a hundred percent sure that the respondent had hypoglycaemia at the material time cannot also be accepted in the absence of any tests having been conducted on the respondent as explained by DW3. In conclusion, the learned trial judge held that the respondent has failed to establish that he was undergoing a hypoglycaemic episode at the material time. He then said:

In the light of my finding on hypoglycaemia the alternative defence submission of intoxication becomes a live issue. In view of the similarity of the symptoms of hypoglycaemia and intoxication as testified by the experts the behaviour of the accused at the material time must have been caused by intoxication. I had called upon the accused to enter his defence on that basis.

[94] From our reading, the last sentence in the paragraph reproduced above do not seem to be in tangent with the rest of the paragraph. Further, learned counsel for the respondent himself stressed upon the court in the course of the case for the prosecution that 'intoxication is never our defence' (see p 39 of the appeal records) and submitted at the conclusion of the case for the prosecution that 'the accused's defence will be only one of hypoglycaemia' and 'that will be the sole defence' (see p 115 of the appeal records). What is clear is that the defence did not suggest and in fact categorically denied intoxication as a defence during the case for the prosecution neither was the said defence raised specifically or otherwise during the defence case. The defence only alluded to intoxication in their submission at the conclusion of the trial. On the contrary, witnesses were in fact called by the defence to counter any suggestion that the respondent was under the influence of alcohol. He was also painted as having a high alcohol tolerance level. The experts were called only after the respondent was called upon to enter on his defence and that was when they enlightened the court as to hypoglycaemia and its symptoms. Thus, we find it difficult to accept that 'the behaviour of the accused at the material time must have been caused by intoxication' was the basis upon which the learned trial judge called upon the respondent to enter on his defence.

[95] The learned trial judge himself confirmed, in his grounds of judgment, that intoxication was not specifically raised by the defence at the conclusion of the case for the prosecution but said he had to deal with the law of intoxication at that stage on the basis that it was the duty of the court to consider a defence if the evidence adduced discloses it even if it has not been raised.

[96] We would have thought that that exercise, viz, to consider a defence if the evidence discloses it even if it had not been raised, should only be undertaken at the conclusion of the trial when all the evidence is before the court. Section 180 of the Criminal Procedure Code ('CPC') provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused and if the court finds a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence. We do not think it is the duty of the court at that stage to anticipate or speculate any defence that has not been raised and give due consideration to it. More so, a defence categorically denied to be the line of defence to be taken as in this case. Consequently, s 181 of the CPC provides that when the accused is called upon to enter on his defence, he or his advocate may then open his case, stating the facts or law on which it intends to rely and making such comment as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses and consequently sum up his case. Section 182A of the CPC provides that

at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[97] Anyway, in support of his view that it was the duty of the court at the conclusion of the case for the prosecution to consider a defence if the evidence adduced discloses it even if it has not been raised at that stage, the learned trial judge referred to the decision of this court in *Chan Chor Shuh v Pendakwa Raya* [2003] 1 AMR 748 and his own decision in *Abdullah bin Jacomah v Public Prosecutor* [2002] 6 MLJ 324. In *Chan Chor Shuh v Pendakwa Raya*, this court held that the law requires the trial judge to consider all the evidence that has been adduced in support of the defence and that a court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case. In delivering the judgment of the court PS Gill JCA (as he then was) said:

> In a suitable case, it has been known that a court must consider a defence even if has not been specifically raised. As Ashworth J stated in *R v Porrit* (1961) 45 Cr App Rep 348 (also at [1961] 3 All ER 463) at p 356:
>
> > As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, if the evidence justifies it, to leave that issue to the jury.
>
> It is a salutary rule of law that the failure to consider a possible legal defence is a miscarriage of justice (see *Ong Ah Too v Regina* [1955] MLJ 247).

[98] From our reading, the above would denote that such an exercise should only, in a suitable case at that, be carried out at the conclusion of the trial. Even then, it should only be considered if the evidence justifies it. Be that as it may, the learned trial judge, notwithstanding that the defence has not raised the defence of intoxication during the case for the prosecution, had dealt with it at length at that stage as reflected in his judgment and having dealt with s 300(a), (b) and (c) of the Code in relation to 'intention' and s 300(d) in relation to 'knowledge', he called upon the respondent to enter on his defence upon being satisfied that the prosecution has made out a *prima facie* case of murder under s 300(d) of the Code. In relation to this he said:

> It will be observed that *clauses (a), (b) and (c)* of s 300 contemplate *intention* in one form or another. In clause (a) it is intention to cause death. In clauses (b) and (c) it is *intention* to cause bodily injury. On the other hand *there is no requirement of an intention to cause death or bodily injury in clause (d) of s 300 ('clause (d)'). Thus intention is not a necessary element in clause (d); all that is required to be proved is knowledge that the act is likely to cause death.* (see *Inder Singh v Crown* (1928) ILR 10 Lah). It has been held that this clause is intended to apply only when there is no intention to cause death, or in other words, when the three earlier clauses are inapplicable (see *Hasta Ismail v Emperor AIR* 1937 Lah 593; *Behari v State* AIR 1953 All 203). Section 86(2) is therefore applicable to clauses (a), (b) and (c) of s 300 and inapplicable to clause (d).
>
> (Emphasis added.)

[99] Anyway, at the conclusion of the trial, the learned trial judge said the onus of proof where intoxication is raised as a defence is on the respondent and that the defence of intoxication can be established without the support of scientific evidence and that having considered the whole of the evidence adduced, it was his firm finding of fact that the respondent was in a state of intoxication at the time of the incident. He then ruled as follows:

> I am therefore satisfied, on the balance of probabilities, that the state of intoxication of the accused at the material time, which I have explained in an earlier part of the judgment, precluded him from forming the necessary intention.
>
> However, in finding that a case had been made out against the accused under clause (d) I had proceeded on the basis that it is the direct consequence of intention having been negated by intoxication that rendered the other parts of s 300 inapplicable.

[100] We are of the view that the second paragraph reproduced above from the grounds of judgment, seems to denote that in calling upon the respondent to enter on his defence, the learned trial judge appeared to have contemplated, at that stage, that intoxication will be a defence.

[101] The learned trial judge consequently ruled that the facts of the case would fall within s 300(c) of the Code and not s 300(d) of the Code and in conclusion held that the facts of the case were sufficient to make out a case under s 304(b) of the Code. We believe this is what made the learned Deputy Public Prosecutor to say that the learned trial judge had made a 'U-turn'. The decision that he made can be laid down as follows:

(i) the circumstances in which the shot (that killed the deceased) was fired went beyond mere knowledge;

(ii) thus, it must be inferred or presumed that the act was done so intentionally;

(iii) hence, the facts of the case fall within s 300(c) where intention is in issue; s 300(d) would not apply;

(iv) the presumption of the absence of intoxication which facilitated a finding that the respondent acted with intention as envisaged by s 300(c) is displaced by the evidence of intoxication on record to show that he did not have the requisite intention;

(v) the inference of intention had been rebutted;

(vi) as the case falls within s 300(c), s 86(2) became applicable and thus cl (d) (of s 300) became inapplicable;

(vii) however, the facts are sufficient to make out a case under s 304(b) of the Code which does not require an intention to cause death or to cause such bodily injury as is likely to cause death.

[102] We are of the unanimous view that the learned trial judge had misdirected himself and erred in fact and in law in holding that the offence did not fall within murder at the conclusion of the trial. It is a question of law as to what is murder and

it is but a question of law, not of fact, as to what the statutory words of the Code mean. In *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 Raja Azlan Shah FJ (as he then was) said (at p 176):

> The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

[103] At the conclusion of the case for the prosecution, the learned trial judge found that the prosecution had made out a *prima facie* case of murder under s 300(d) of the Code against the respondent and called upon him to enter on his defence. We are of the view that the learned trial judge was correct in ruling as such. In arriving at that decision he had extensively and correctly appraised the law. We would agree with his finding that the following ingredients of murder under s 300(d) of the Code have been established at the conclusion of the case for the prosecution, namely:

(a) that the respondent knew that his act of discharging the gun at the deceased at such close quarters is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death; and

(b) that the act of the respondent was wholly inexcusable.

[104] Besides being satisfied that the facts are capable of coming within the ambit of s 300(d) of the Code, the learned trial judge was also of the view at the conclusion of the case for the prosecution that the fact that the respondent was in a state of intoxication does not exclude him from liability under s 300(d).

[105] There was clearly a prima facie case against the respondent which, if unrebutted, would warrant his conviction and the learned trial judge was correct in calling upon the respondent to enter on his defence. The learned trial judge correctly observed that 'intention' is not a necessary element in s 300(d) of the Code and all that is required to be proved is 'knowledge' that the act is likely to cause death.

[106] Section 299 of the Code defines culpable homicide and it reads:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits an offence of culpable homicide.

[107] In *Behari v State* AIR 1953 All 203, when discussing s 299 of the Indian Penal Code and its relation with the fourth clause of s 300 of the same, which is in pari materia with ss 299 and 300 of our Code, Agarwala J said (at p 205):

> Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. It is strange that in some cases S 299 has been taken to be the definition of culpable homicide not amounting to murder, although the section clearly speaks of culpable homicide simpliciter. The scheme of the Penal Code is that first the genus 'culpable homicide' is defined. What is left out of culpable homicide after the special characteristic of murder have

been taken away from it, is culpable homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder.

[108] In relation to the same provisions, Agarwala J said (at p 206):

> Both require knowledge of the probability of the act causing death. Clause (4) of s 300 requires knowledge in a very high degree of probability. The following factors are necessary:
>
> (i) that the act is imminently dangerous, (ii) that in all probability it will cause death or such bodily injury as is likely to cause death, and (iii) that the act is done without any excuse for incurring the risk.
>
> Clause (4) of s 300 is not intended to apply to cases in which a person intends to inflict an injury likely to cause death because the section speaks of knowledge and not of intention of an injury likely to cause death. Usually, it applies to cases in which there was no intention of causing death or of causing any bodily injury. It may, however, also apply to an act in which the intention is to cause simple grievous hurt merely, but the act is done with the knowledge and in the circumstances mentioned in the clause.

[109] It is clear that the crux of the defence case is that at the time of the commission of the offence, the respondent was undergoing a hypoglycaemic attack and was therefore in a state of automatism. This was what the learned trial judge also said in *Public Prosecutor v Kenneth Fook Mun Lee @ Omar Iskandar Lee bin Abdullah (No 1)*.

[110] At the conclusion of the trial, the learned trial judge held that the defence of automatism raised by the respondent could not be sustained. He found that the respondent was sufficiently conscious of what he was doing when he fired the fatal shot as a result of a decision made by him to do so following a refusal by the deceased to obey his instructions. The learned trial judge also held that the respondent had failed to establish that he was undergoing a hypoglycaemic episode at the material time.

[111] We agree with the learned trial judge that the defence had failed to prove that the respondent was not conscious of what he was doing as a result of an unexpected hypoglycaemic attack. We noted that it was not even proven that the respondent was a diabetic. Even his witness, DW6 said that to be hypoglycaemic one must be a diabetic. The evidence showed that he had lunch at about 3pm on the day of the incident. PW18 said that the body gets its supply of glucose from food, predominantly carbohydrate and this is from regular meals and food is able to provide glucose for seven to eight hours. She opined that once a person eats a meal he should be able to have a glucose supply for seven to eight hours.

[112] We are of the view that the respondent had not produced sufficient medical evidence for it to be reasonably inferred that he was not acting voluntarily at the time of the alleged offence. The evidence showed that the respondent had two meals that day prior to the incident. In his testimony, the respondent claimed he could not remember what happened from the point of time he had lunch and that he only remembered waking up at some police station. In relation to this, PW18 was of the

A view that a person who had lunch at 3pm cannot experience a hypoglycaemic condition immediately after that. In relation to this she testified:

> In this case, alcohol induced hypoglycaemia is not possible as accused had food.
>
> In the context of the characteristics of the accused and all the data made available to me, it is highly unlikely for the accused to have had hypoglycaemia in the hours following the lunch. This would have included 7.30pm onwards because his body compensatory mechanisms would have preserved his glucose balance.

[113] We find that the learned trial judge was correct in his findings as discussed above as far as the defence of automatism and hypoglycaemia is concerned.

[114] Intoxication was only raised during submission by the respondent's counsel at the conclusion of the trial. In arriving at the decision that he made at the conclusion of the trial, the learned trial judge held that since the respondent failed to establish a hypoglycaemic episode at the material time, the 'alternative defence submission of intoxication becomes a live issue'. He then made a finding of fact that the respondent was in a state of intoxication at the time of the shooting incident which precluded him from forming the necessary intention.

[115] Looking at the facts, it appears that there is no evidence to show that the respondent was intoxicated at the time of the incident. PW14, the owner of the said restaurant said the respondent looked normal and did not look drunk when he left the said restaurant. DW5, the respondent's colleague who was at the lunch said that the respondent was not affected by drinks, his speech and behaviour was usual and he did not misbehave. When they left the said restaurant the respondent was normal and he saw him walking to his car. PW4, the taxi driver at the scene said the respondent looked steady and was not staggering when walking. He also did not 'get any smell' from the respondent. PW7, the police officer who arrested the respondent observed he was steady before his arrest. In his evidence, the respondent even insisted that he was not highly intoxicated on the day of the incident. He could even recall what clothes he wore on that day and the number of glasses of beer he consumed. The defence did not elicit any evidence concerning the matter of intoxication but submitted on intoxication only at the conclusion of the trial.

[116] The learned trial judge had, in his judgment, observed that blood alcohol level is not conclusive to determine the degree of intoxication of a person and had cited *PP v Ramasamy a/l Sebastian*. In that case, Chao Hick Tin JC was of the view that different people react differently to the same blood alcohol level and that it makes a great difference whether the person is or is not an experienced drinker. In his judgment, the learned JC said the more reliable indicator of the state of mind of the accused must be the conduct of the accused immediately prior to and after the offence.

[117] Looking at the above we are of the view that even if the respondent was intoxicated as found by the learned trial judge, on the evidence he was not in a highly

advanced stage of drunkenness as not to know what he was doing for the following reasons:

(i) he could drive after leaving the said restaurant and could consciously negotiate a route where he has to pass through two toll gates; the respondent was in full control of his car as a car surely cannot be driven along a road in the city of Kuala Lumpur without the mind directing the limbs for the journey;

(ii) he could make a telephone call to his wife to say he was on his way home at 7.15pm;

(iii) at the scene of the incident, when he tried to stop a motorcyclist who then sped off, he was capable of drawing his gun from an ankle holster and was able to squeeze the trigger to fire a couple of rounds in the air; he was also able to talk to PW4, the taxi driver and was in position to give instructions which could easily be understood; subsequently, he was able to aim the gun at the deceased, squeeze the trigger and shoot her through the windscreen and later, at PW6 and also the military land rover;

(iv) at about 11.15pm at the IPK, he was able to have an intelligent conversation with PW15 and specifically request that he be allowed to make a telephone call to Tan Sri Musa Hitam;

(v) when he was being examined by PW8 at about 1.15am on 23 August 2000, he was able to sign the consent form for the taking of blood and urine samples, to write an intelligible note to Professor Dr Ernest Yeoh requesting him to make a call to his wife at a given telephone number to inform her about the arrest and for her to make a call to Tan Sri Musa Hitam; further, he was able to have an intelligent conversation with PW8 about his health, was able to answer her questions and give her the details requested for and was very cooperative throughout the examination.

[118] The evidence of DW6, Dr Thiagi showed that the respondent was a person who can 'hold' himself very well after consuming alcohol. In relation to his drinking habits, the respondent stated his maximum is about 6 glasses of beer. His choice of drinks is beer at lunchtime and also after a game of golf. In the evening it is whisky and with a western dinner it would be wine if it is served and he would complement it with brandy. On his drinking habits, DW4, the respondent's wife stated:

> We used to go out together always. We go out for dinner outside the house. As a matter of preference he would normally drink whisky. It will be Black Label or Famous Cerous. He also takes brandy and beer. Beer is not a preferred drink of Kenny. He would normally have beer after playing golf. He would have three or four glasses after playing golf. Sometimes he drinks more than three or four glasses. I have seen him having five glasses. I also play golf. Most of the time I play golf with him. The other times we play with our respective friends. He has about seven to eight drinks of whisky. That is when he has his dinner. Sometimes he exceeds that. He then takes eight to nine whiskies. I have seen him drinking a lot more on occasions during company dinners, birthdays and anniversaries. Then he will take easily three-quarter to a bottle of Black Label.

[119] Thus, the evidence showed the respondent is not a first time drinker. He is an experienced drinker and do not seem to have any problem with alcohol and can

'hold' his drinks. On the day of the incident, the respondent was armed with a loaded gun which he kept in an ankle holster. We are of the view that he cannot be regarded as a person having no knowledge about the dangerous character of a loaded gun which is clearly a lethal weapon. The learned trial judge ruled at the close of the case for the prosecution, and we agree, that at the time of the incident the respondent was sufficiently conscious of what he was doing. In his judgment, the learned trial judge held:

(i) the sequence of events indicate that he had sufficient mental capacity to be responsive enough to make a decision;

(ii) he was sufficiently conscious of what he was doing when he fired the fatal shot as a result of a decision made by him following a refusal to obey his instructions;

(iii) he was in a position to decide when to fire and when not to; he was therefore conscious of what he was doing;

(iv) the conduct of the respondent in firing the shot shows that it was done with absolute callousness towards the result.

[120] The fact, as found by the learned trial judge, that the respondent was intoxicated at the time he shot the deceased is no excuse. Section 85(1) of the Code clearly provides that save as is provided in the section and in s 86, intoxication shall not constitute a defence to any criminal charge. We also cannot see how intoxication can be available to him as a defence under s 85(2) of the Code; the intoxication, if at all, was admittedly self-induced and therefore, he must be deemed to have committed the act with the same knowledge as he would have had if he had not been intoxicated. The charge he is facing is murder under s 300(d) of the Code. The mens rea for that offence is 'knowledge' and not 'intention'. This issue and also the question of burden of proof with regard to intoxication was dealt with in *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338. In that case, Yong Pung How CJ said (at p 344):

> Section 86(2) of the Penal Code states:
>
> > Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any *intention*, specific or otherwise, in the absence of which he would not be guilty of that offence.
> >
> > Where the effect of intoxication is that the accused person did not form the requisite intention, s 86(2) may, of course provide a complete defence. Alternatively, s 86(2) can be a mitigating circumstance which may render an accused to be guilty of a lesser offence due to the fact that he did not by reason of intoxication form the requisite intention for the graver offence: see for example *Suba Singh v PP, Tan Hung Song v PP, and PP v Teo Heng Chye*.
> >
> > It is to be noted that an anamalous consequence of the drafting in s 86(2) is that it applies only where the *mens rea* for the offence is *intention*, in contradistinction to offences requiring other forms of mens rea specified in the Penal Code, for example, *knowledge* or rashness. *The result is somewhat disturbing; for example s 86(2) would apply to a charge of murder under s 300(a), (b) or (c) but not to a charge of murder under s 300(d). However the words of the provision are clear and the consequences though discomfiting are not of such degree of absurdity as would justify the court departing from a literal interpretation.*

Another aspect of s 86(2) on which there is some controversy is whether the burden of proof falls on the accused person to prove on a balance of probabilities that he was so intoxicated that he did not form the necessary intention, or whether the burden remains on the prosecution to prove beyond reasonable doubt that, in spite of the intoxication, the accused person did form the requisite intention.

I am inclined to favour the former view. Sections 85 and 86 are found in Ch 4 of the Penal Code which deals with general exceptions, for which the burden of proof falls on the accused persons by virtue of s 107 of the Evidence Act (Cap 97). Furthermore, s 85(1) expressly refers to s 86 as dealing with the 'defence' of intoxication. *Therefore, any evidence of intoxication does not affect the prosecution's case; in proving beyond reasonable doubt that the accused had the necessary mens rea the prosecution is entitled to treat the accused as if he were sober.* The court may no doubt have to answer some rather hypothetical and artificial questions in the process, but this is preferable to a solution which is completely out of accord with the general scheme of the Penal Code and the Evidence Act. Furthermore, the scope of s 86(2) generously extends to voluntary intoxication, a legal excuse which, in my view, can never put an accused in a more favourable position than another accused who pleads any of the other defences.

(Emphasis added.)

[121] In the instant appeal, we are of the view that the weight of evidence clearly established that the respondent was very much in control of his actions despite the alcohol he consumed. The evidence showed that at the place of the incident, the respondent was capable of moving himself independently and was able to converse with others. There was no evidence to show that he was staggering or was incoherent in his speech; PW4 could comprehend him. We find that he has failed to prove any incapacity as would be available to him as a defence. There is nothing to show that his mind was so affected by the alcohol he had consumed that he was incapable of knowing that what he was doing was wrong. When a man is charged with murder, we do not think it is a defence for him to say that he does not remember a thing. In *Santosh v The State of Madhya Pradesh* (1975) Cri LJ 602, in dealing with s 300 of the Indian Penal Code, Beg J held, at p 603 as follows:

An intention to kill is not required in every case. A knowledge that the natural and probable consequences of an act would be death will suffice for a conviction under s 302 IPC.

[122] In *Manindra Lal Das v Emperor* AIR 1937 Calcutta 432, in dealing with s 300(d) of the Indian Penal Code, Henderson J said:

It was not necessary for the prosecution to establish any intention here. It was enough to show that the appellant knew that he was likely to cause grievous hurt.

[123] In *Kanji v State* (1953) Cri LJ 434, the facts showed that the appellant, who had been drinking since morning on the day of the incident had, at about 6.00pm on the same day, shot at a 14 year old boy, Siv Lal who was picking raw mangoes in the Bageechi with another boy. He surrendered the next day. He made a statement saying that there was a marriage party and that he and others had been drinking from the morning. He later went away to the house of one Amera Kumhar and had more drinks there. Thereafter he came to the Bageechi where the marriage party was staying and found a number of persons grappling with one another. He asked them

not to fight. The gun was in his hand at that time and was loaded. It went off somehow and he cannot say how it happened. The shot hit the boy. Thereafter he said he did not know what happened because he was not in his senses on account of intoxication.

[124] The appellant was sentenced to death under s 302 of the Indian Penal Code. The court found that the gun was fired by the appellant at the deceased. He appealed. In delivering the decision of the appellate court, Wanchoo CJ said (at p 435):

> It may be accepted that the appellant was intoxicated at the time when the incident took place. One of the witnesses said that he was staggering when he was going to the Bageechi. But the drink was not administered to him without his knowledge or against his will and, therefore, he must be deemed to have committed this act with the same knowledge as he would have had if he had not been intoxicated. The case, therefore, in our opinion, is clearly covered by the fourth clause of Sec 300, which is as follows:
>
> > If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

[125] In relation to the illustration to s 300(d) of the Indian Penal Code, Wanchoo CJ said (at p 345):

> This illustration shows that it is not even necessary to aim the gun at any particular person in order to bring the case under the fourth clause to s 300, provided the nature of the act is such that it is so imminently dangerous that any man should know that it will, in all probability cause death or such bodily injury as is likely to cause death.

[126] At the same page, the learned CJ said:

> We are, therefore, of the opinion that where a person takes the risk of shooting at another the act would ordinarily be an imminently dangerous act which must in all probability cause death or such bodily injury as is likely to cause death and the case would be covered by the fourth clause to s 300.

[127] In his judgment the learned trial judge in the instant appeal said the defence of intoxication can be established without the support of scientific evidence. We would not disagree with that but then we cannot ignore and overlook the fact that there was the lack of cross-examination of witnesses by the defence touching upon intoxication during the whole trial. In *Re Pitchi Muthu* [1970] 2 MLJ 143, Sharma J in exercising his revisionary powers in a case from the sessions court noted that the defence raised by the accused was subsequently suggested for the first time only when the defence was called. He said the learned president of the sessions court had misdirected himself in ignoring the evidence of certain prosecution witnesses and the total lack of cross-examination of these witnesses touching the defence which was subsequently suggested for the first time only when the defence was called. Similarly in the instant appeal before us, we cannot ignore and overlook the lack of cross-examination of witnesses called before and after defence was called touching

upon intoxication. We also cannot ignore the fact that the 'alternative' defence of intoxication was only suggested for the first time during the defence submission at the conclusion of the trial. We further cannot ignore the fact that the foundation for such a defence had not been properly laid.

[128] Section 182A of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt and if the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it. In this instant appeal, on the evidence, we are of the unanimous view that the learned trial judge had misdirected himself in fact and in law and ought to have found the respondent guilty on the original charge of murder. The facts are sufficient to bring the case within the ambit of s 300(d) of the Code and the act of the respondent would fall within the definition of murder. The invocation of s 300(c) of the Code by the learned trial judge is altogether erroneous. Intention is not a necessary element of an offence under s 300(d). All that is needed is knowledge that the act is likely to cause death. The emphasis in s 300(d) is on the imminently dangerous character of the act itself. Further, s 300(d) is usually applied where the act of the offender is in general disregard for human life and safety. What is clear from the evidence is the respondent did not know the deceased. He discharged the gun in absolute callousness towards the result. The act of the respondent cannot fall within the purview of s 304(b) of the Code. He has committed culpable homicide amounting to murder and the offence committed by him clearly fall under s 300(d) of the Code. All the evidence proved beyond doubt that he had performed the act knowingly and voluntarily and hence must be guilty of an offence under s 302 of the Code. The respondent had failed to show on a balance of probabilities that he did not know that his act of discharging his gun at the deceased at such close quarters is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The learned trial judge's ruling at the conclusion of the trial that the facts cannot fall within s 300(d) of the Code cannot be supported having regard to the evidence. On the evidence it was clearly open to the learned trial judge to find that it was established beyond reasonable doubt that the respondent caused the death of the deceased.

[129] We are unanimously of the view that the appellant is guilty of murder under s 302 of the Code and hence, we accordingly allowed the appeal by the Public Prosecutor, substituted the conviction under s 302 of Code in place of the conviction under s 304(b) of the Code and sentenced the respondent to death by hanging. His appeal against conviction and sentence under s 304(b) of the Code is rendered academic and abates by virtue of our decision in allowing the appeal by the Public Prosecutor.

Appeal allowed.

Reported by Loo Lai Mee